Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1265

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

Petitioners,

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
Reasons for Granting the Writ:	
1. The decision below conflicts with the provisions of the Fourteenth Amendment and the Civil Rights Laws, 42 U.S.C. § 1981 et seq. and 42 U.S.C. § 2000e et seq.	8
2. The decision below frustrates the public's interest in having the best qualified firemen, which interest precludes preferential hiring on the basis of race	14
3. The decision below raises significant and important issues and problems which should be resolved in this Court	15
Conclusion	16

APPENDIX INDEX

	Page
Appendix I—Opinion dated September 9, 1971	A- 1
Appendix II—Opinion dated January 7, 1972	A-23
Appendix III—Chapter XIX, Charter of the City of Minneapolis	A-35
Appendix IV—Rules of Civil Service Commission of City of Minneapolis, as amended through November 2, 1970	A-39
Appendix V—Minnesota Statutes 1969, Veterans Preference Act, §197.45	A-41

TABLE OF AUTHORITIES

Cases:	Page
Bolling v. Sharpe, 347 U.S. 497 (1954)	13
Butler, et al., v. Pennsylvania, 51 U.S. 402 (1850)	14
Cafeteria Workers v. McElroy, 367 U.S. 886 (1961)	14
Crawford v. Davis, 249 F. Supp. 943 (U.S.D.C. E.D. Pa., 1966, cert. denied 383 U.S. 921)	14
Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971)	8, 10, 13
Keim v. United States, 177 U.S. 290 (1900)	14
Morbeto v. United States, 393 F. Supp. 313 (U.S.D.C. C.D. Calif. 1968)	14
Pickering v. Board of Education, 391 U.S. 563 (1958)	14
Schneider v. Ruck, 377 U.S. 163 (1964)	13
Shapiro v. Thompson, 394 U.S. 618 (1969)	13
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)	11
White v. Berry, 171 U.S. 366 (1898)	14
Yakus v. U. S., 321 U.S. 414 (1944)	14

Statutes and Constitution:	Page
42 U.S.C. § 1981 et seq.	8
42 U.S.C. § 2000e et seq.	8
U. S. Constitution, Fourteenth Amendment	8, 15

Secondary Authorities:

Harvard Law Review, Vol. 84:09, 1971, "Employment Discrimination and Title VII of the Civil Rights Act of 1964", page 1114 ..... 10, 12

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GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Hugh Gallagher and Ward Canfield respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 7, 1972.

Said Petitioners were original defendants herein, having been sued individually and as Commissioners of the Civil Service Commission of the City of Minneapolis. A third

member of the three-man Commission, Gleason Glover, was an originally named defendant who did not participate in the appeal below, is no longer a member of the Commission, and has been replaced by Gerald Singer, who does not join in this petition. Neither John Proctor, named individually and as Personnel Director of the Commission, nor Elizabeth White, named individually as an Acting Personnel Director of the Commission, nor Kenneth W. Hall, named individually and as Chief of the Fire Department, now hold such positions, the latter through retirement.

OPINION BELOW

The opinion of the Court of Appeals reported in 452 F.2d 315 (1972), including the decision of the panel of the Court of Appeals for the Eighth Circuit dated September 9, 1971, and the opinion of the Court en banc on rehearing dated January 7, 1972, appear in full in the appendix hereto. The decree which was rendered by the District Court for the District of Minnesota, dated March 9, 1971, as well as the District Court's order for stay pending appeal dated April 4, 1971, neither of which were reported, are fully set forth in the panel decision at Appendix pages A-4 through A-12.

JURISDICTION

(i) On September 28, 1970, Respondents filed a complaint in the United States District Court for the District of Minnesota claiming jurisdiction based on 28 U.S.C., §§ 1331 and 1343 (3) and (4). Respondents requested a permanent injunction prohibiting the hiring of firemen by the City until certain Civil Service Commission regulations claimed to be discriminatory against minority applicants for the position of fireman were changed, and to require absolute minor-

ity preference to the first 20 firemen who qualified on the basis of the revised regulations and tests. Such a preliminary injunction was granted on November 5, 1970, and continues in effect at the present time.

(ii) The judgment of the Court of Appeals for the Eighth Circuit was entered on January 7, 1972, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether the requirement in the Court below that minority applicants for positions of fire fighter for a City be given preference over equally or superiorly qualified white applicants is constitutionally permissible.

(2) Whether the decision below is an improper interference with the City's legitimate public interest in having the best qualified firemen without regard to preferential hiring on the basis of race.

STATEMENT OF THE CASE

Respondents brought this action as a class action on behalf of minorities under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, claiming that recruitment, examination and hiring practices of Petitioners denied them due process of law guaranteed under the 14th Amendment to the United States Constitution by discriminating against them on the basis of race or color, as well as their right to equal protection of the law guaranteed by the United States Constitution, in that their class was denied equal opportunity for employment with the Minneapolis Fire Department without any reasonable basis, and in the absence of any compelling state interest. It was also claimed that they

were denied their right to enter into employment contracts guaranteed by 42 U.S.C. 1981 by discriminating against them in seeking and obtaining employment with the Minneapolis Fire Department on the basis of race or color. It was also claimed that 42 U.S.C. 1981 would be violated if the provisions of the Minnesota Veterans Preference Law, Minnesota Statutes § 197.45 (App. V hereto), were to be enforced.

The printed Appendix containing the entire record was submitted to the 8th Circuit Court of Appeals, and parenthetical references hereafter will be to that Appendix.

The Civil Service Commission of Minneapolis undertook to set up and hold an examination for fire fighter, originally scheduled to be held in November of 1970. On October 28, 1970, a complaint was filed (A. 7-20) asking that the examination be enjoined until various alleged discriminatory matters were corrected or redressed (A. 16-19). The durational residency requirement of Minnesota Statutes 197.45, subd. 1, were also attacked (A. 19 & 20). This feature of the case was submitted to a three-judge court and is not here in issue (A. 4). A Preliminary Injunction and Order forestalling the examination was filed on November 5, 1970 (A. 24-27).

The parties stipulated into evidence examination plans, tests, answer sheets, summary sheets and materials related thereto (A. pp. 27-35, Exs. Nos. 1-35); classification plans, specifications of position duties, standards, assignments (A. pp. 31-32, Exs. Nos. 36-46).

Various surveys, reports and analyses of minority employment in the City were stipulated in (A. 32, Exs. 47 through 50) as used by the Commission and its staff in establishing minority recruitment programs. Positive, direct, affirmative and deliberate efforts by the Civil Service Commission and

other community resources were undertaken beginning with the "Policy Statement for Employment" of the Commission in November, 1969 (A. p. 32, Ex. 51), and continuing with the Commission's "Employment Program Objectives" (A. p. 32, Ex. 52), and "Summary and What Has Been Done Toward a Positive Minority Employment Program", dated Nov. 14, 1969 (A. p. 32, Ex. 53).

Further evidence of the real effort by the Commission, its staff, and others to enhance minority employment in the City is provided in the Exhibits 53 through 67 as described in the stipulation (A. pp. 32 and 33).

At least as early as 1967 the Civil Service Commission became concerned about minority recruitment and it instructed its staff to encourage minorities and blacks in particular to be given a fair chance in terms of examinations (A. 193). Objections had been made that oral examinations were discriminatory and they were eliminated in 1955 (A. 197).

Positive and affirmative efforts were made in connection with the examination here proposed to be given to gain the attention of and to recruit the participation of minority applicants. "For the first time the Civil Service Commission, minority organizations and representatives of the fire fighters union were working together in a constructive way to try to alleviate some of the problems facing. I will say it in terms of, equal opportunity in the Fire Fighters Department" (A. 111, 199). Recruitment efforts were felt to be on the right track (A. 129). A pre-employment testing program was undertaken. A major involvement in the recruiting effort was that by the Civil Service staff in the pre-test tutoring session (A. 224 & 225). Twenty-seven such sessions for fire fighter prospects were held in the summer of 1970 (A. 279).

Particular attention was paid by the Commission and its staff to the impending fire fighter tests to overcome any barriers to minorities, both in testing and recruitment (A. 275, 318). Out of almost 500 applicants 25 stated they were of minority groups (A. 298).

A primary concern on the part of the Commission and its staff was to be sure that the fire fighter's test was validated, both in terms of relevancy to the job and that there be no cultural or racial discrimination or bias (A. 109).

It had not been customary either in Minneapolis or on a national basis to validate such examinations, but when the possibility of cultural bias first came to the Commission's attention it was decided to do two things: one was to hire someone who was competent in the area, and the other to hire a consultant firm to set up a validation program, which has been done by contracting with a consultant and hiring a research analyst with a master's degree in the area of testing (A. 274).

The Commission was concerned with other requirements for the position of fire fighter as to whether the requirements were necessary or unnecessarily discriminatory.

The principal issue involving a serious constitutional question is the granting of preference to minority applicants, and discrimination in that process against superiorly qualified white applicants.

In the decree of the District Court for the District of Minnesota, found in the Appendix hereto beginning at page A-4, Judge Larson ordered that there be "given absolute preference in certification of fire fighters with the Minneapolis Fire Department to twenty (20) Black, American Indian, or Spanish-Surnamed-American applicants for fire fighter who qualify for such positions on the basis of the examinations

given . . . and who meet the requirements of said (validated) examination plans." The Court decreed also at pages 5 and 6 of the Appendix hereto that the officers of the City be enjoined from enforcing the provisions of Minnesota Statutes § 197.45 (the veterans preference statute) (App. V hereto), and the provisions of the Minneapolis City Charter, Chap. 19, §§ 7 and 15 (the basic provisions of our Civil Service Merit System, designed to promote efficiency in the City service, requiring that appointments to the civil service should be based upon merit, determined by fair, public, competitive, impartial and nondiscriminatory examinations and testing procedures), found in App. III and IV hereto.

On appeal to the United States Court of Appeals for the 8th Circuit, a three-judge panel rendered a decision on September 9, 1971, which is appended hereto at pages A-1 to A-22. It struck down the absolute minority preference granted in the District Court on the grounds that "U.S.C. § 1981 and the 14th Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks."

Petition was made for rehearing by the 8th Circuit en banc which was granted. In its decision filed January 7, 1972, appended hereto at pages A-23 through A-34, the panel decision was adopted except as to the minority preference issue. It held that "the absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions" and stated "we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another". It held that in view of what it found to be past discrimination, minority preference

should be granted to 20 firemen out of the next 60 hired, on the basis that there be 1 out of every 3 persons hired who would be a minority individual, until at least 20 minority persons have been so hired.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the provisions of the Fourteenth Amendment and the Civil Rights Laws, 42 U.S.C. § 1981 et seq. and 42 U.S.C. § 2000e et seq.

In its January 7, 1972 opinion, the majority of the 8th Circuit Court stated:

> "The panel opinion, while sustaining most of Judge Larson's findings and orders granting affirmative relief, did not approve of the absolute preference in Fire Department employment to 20 minjority persons who met the qualifications for the positions under the revised qualification standards established by the decree and held that the absolute preference order infringed upon the constitutional rights of white applicants whose qualifications are established to be equal or superior to the minority applicants. That panel held:
>
> > "'Section 1981 and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. We believe that § 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks.'"

It then quoted *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971):

> "'Congress did not intend by Title VII, however to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a member of a minority

group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' 401 U.S. 424, 430-31."

As to this being a landmark decision and one of first impression the Court said (A. II. 25 & 26):

"The absolute preference of 20 minority persons who qualify has gone further than any of the reported appellate court cases in granting preference to overcome the effects of past discriminatory practices and does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified.

"The panel opinion has recognized the illegality of the past practices, has ordered those practices abandoned, and the affirmative establishment of nondiscriminatory practices and procedures. There is, as the panel pointed out, no claim or showing made that the plaintiffs were identifiable members of the class who had made prior applications for employment and were denied employment solely because of race. This latter situation could be remedied immediately by ordering the employment of such persons. However, in dealing with the abstraction of employment as a class, we are confronted with the proposition that in giving an absolute preference to a minority as a class over those of the white race who are either superiorly or equally qualified would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution."

The Court pointed out that the total minority population of the Minneapolis area was 6.4% in 1970, and that Black population was 4.3%. However, it should be noted that as to the significance of the proof of discriminatory practices now or in the past, those present members of the department

who entered city service in the 1940s did so when the black population of Minnesota amounted to 0.36% and the total minority population amounted to 0.84%, and in Minneapolis 0.94% black and 1.07% total; in the 1950s when there were 0.47% blacks and a total of 0.97% with the corresponding figures for Minneapolis alone of 1.30% and the total 1.62%; in the 1960s when the figure reached 0.65% and 1.23% for the State and 2.44% and 3.23% for the City. These figures (1970) for the present day with which we are all concerned and endeavoring to cope are larger but still of modest proportions: 0.92% black and 1.81% total for the State, and 4.37% black and 6.44% total for the City (A. p. 53, Ex. 85, Table I, and A. p. 55, Table III). As for black males in proportion to the total male population, the 1970 figure is 4.70% for Minneapolis.

Under these circumstances we believe that the courts below have indulged in an unwarranted and excessive principal reliance on statistics relating to the present lack of minority representation in the Fire Department in support of their finding that there must have been past discrimination. See Harvard Law Review, Vol. 84:69, 1971, "Employment Discrimination and Title VII of the Civil Rights Act of 1964", page 1114.

In *Griggs, supra*, at page 436 of the report, this Court concluded:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controll-

> ing factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract."

While the Court sitting en banc declared that the granting of absolute preference to the first 20 minority firemen was constitutionally unacceptable, it proceeded to find that a dilution of this absolute preference to provide that if need be one out of every three minority applicants in order would have to be absolutely preferred over equally or superiorly qualified white applicants. No logical, justifiable basis can be seen for such an abandonment of the basic constitutional principle through specious dilution of it.

In this connection it should be noted that one of the members of the original panel, Van Oosterhout, Senior Circuit Judge, dissented, and was joined by Mehaffy, Circuit Judge, in that dissent. The dissent said as to such provision (App. II hereto):

> "Such provision . . . is vulnerable to the same constitutional infirmity as Judge Larson's absolute preference provision. This court's minority preference provision will not discriminate against as many white applicants as Judge Larson's decree but it will still give some minority persons preference in employment over white applicants whose qualifications are determined to be superior under fairly imposed standards and tests.
>
> "Employment preferences based on race are prohibited by the Fourteenth Amendment."

Judge Van Oosterhout referred to the case upon which the largest reliance was placed by the majority, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and quite properly distinguished it by stating that "whites have no right to insist upon segregated schools, while white as well as Black

applicants cannot be denied employment on the basis of race."

He also disposed of the pretext that past discrimination if it existed is a present justification for discrimination by stating:

> "Past general racial discrimination against Blacks under the circumstances of this case does not justify unconstitutional present racial discrimination against white applicants."

The Harvard Law Review article cited above, in discussing the principles of color blind hiring and school integration, stated:

> "Moreover, color blindness may be constitutionally required. Equal protection and due process require at least that any government action which is predicated upon color must be necessary to the attainment of an overriding governmental purpose. It may mean even more than this; there may be no governmental purpose which can justify state action imposing burdens on the basis of race. An analogy might be drawn to school integration where courts, as a remedy for state-imposed segregation, have specified quotas for the integration of faculty and student body. But that analogy is inapposite. The judicial theory of school integration has been that children are helped by integration or, at the least, that white children are not harmed by it. When the government requires that a black man be given a job in preference to a more qualified white, harm predicated on race is clear. The standard of color blindness is also supported by considerations of fairness to white workers and to employers. The individual worker or employer may have had no part in discrimination against blacks; to impose on him the costs of remedying societal discrimination seems unjust. It is all the more unjust since the burden would fall most heavily on whites who are themselves relatively deprived."

In *Griggs, supra*, the Court pointed out that all employment decisions not related to job performance were arbitrary and consequently illegal. Increased recruitment meets the job relationship requirement, for increased recruitment enlarges the available pool of job applicants and consequently improves the chances that the best qualified candidates will be hired. Job skill training is ipso facto job related.

In contrast, affirmative relief calling for the hiring of persons on the basis of their race or national origin is clearly arbitrary. No basis exists for concluding that minority persons will perform more successfully the duties of fireman than whites and, therefore, the absence of a proven relationship between race and job success makes the hiring on the basis of race clearly arbitrary. *Griggs, supra*, at 431. Arbitrary classifications based on race or anything else are clearly unconstitutional. *Bolling v. Sharpe*, 347 U.S. 497 (1954). See *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163 (1964).

As far as the other legal authorities cited below in support of their finding that there should be minority preference, these are all cases in the private sector, and in none of these cases were applicants for membership in a union or for employment also afforded or had available to them anything like the non-discriminatory merit system of civil service employment we have guarded by state and local laws and ordinances such as are here under attack.

We believe preferential minority hiring under the circumstances of our case is unconstitutional as the original Court of Appeals panel held, and which the full Court approved in principle. It is no cure of that constitutional infirmity to unconstitutionally discriminate once out of every three times, or to unconstitutionally discriminate just occasionally for a

while, or for a limited time. One either discriminates on account of race or one does not.

2. The decision below frustrates the public's interest in having the best qualified firemen, which interest precludes preferential hiring on the basis of race.

Insofar as government employment litigation is concerned, the "problem in any case is to arrive at a balance between the interests of the (applicant or employee) . . . and the interest of the state as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1958).

The courts have consistently recognized the importance of government efficiency by avoiding any action which could interfere with it. See *Keim v. United States*, 177 U.S. 290, 293 (1900); *White v. Berry*, 171 U.S. 366, 378 (1898).

On balance the interest of the City of Minneapolis in promoting the efficiency of its Fire Department by having it composed of the best qualified individuals is of paramount interest. No injunctions should have been issued or continued preventing the municipality to proceed and continue to conduct its vital and necessary fundamental concerns and business as was here done. Injunctions against the carrying out of the merit provisions of the City Charter and the provisions of the Veterans Preference laws should not have been granted. See *Butler, et al., v. Pennsylvania*, 51 U.S. 402 (1850); *Yakus v. U. S.*, 321 U.S. 414 (1944); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961); *Crawford v. Davis*, 249 F. Supp. 943 (U.S.D.C. E.D. Pa., 1966, cert. denied 383 U.S. 921); *Morbeto v. United States*, 393 F. Supp. 313 (U.S.D.C. C.D. Calif. 1968).

3. The decision below raises significant and important issues and problems which should be resolved in this Court.

Fair, impartial and non-discriminatory employment of public servants is an important objective which public bodies in the United States have come a long way toward achieving in the over-all public interest through federal, state, and local laws, ordinances and practices. Whether it is now appropriate or defensible to inject into this body of law and in the face of the Fourteenth Amendment prohibition against race discrimination court-sanctioned minority preference, however diluted, which utterly abrogates hard-fought-for principles of merit in the public civil service is of the utmost importance and concern to the citizens of our country and the various public bodies that govern them, from the lowest local level up to the federal government itself.

The question here is one of manifest and obvious importance which, as was to be expected, has created wide-spread interest and inquiry. As one might also expect, it has also created considerable confusion as to what the final answer will be. Up to now in this case three answers have been made:

(1) That there should be in public employment immediate absolute preference given to minorities on the grounds of their race or color if there is any evidence of past discrimination.

(2) That there should be no discrimination in public employment on the grounds of race or color; and

(3) That a little, or partial, or temporary discrimination on the grounds of race or color is constitutionally justified.

The final answer to the problem here raised is of vital and profound importance to the thousands of governmental en-

tities and millions of government employees who are deeply concerned. Only this Court can provide this answer.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1181

Gerald Carter, et al.,
Plaintiffs-Appellees,
and
Minneapolis Commission on Human Relations,
Plaintiff-Intervenor-Appellee,
vs.
Hugh Gallagher, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the District of Minnesota.

[September 9, 1971.]

Before MATTHES, Chief Judge, VAN OOSTERHOUT, Circuit Judge, and EISELE, District Judge.

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by defendants from decree enjoining them from holding examinations and setting standards for the purpose of determining qualifications of applicants for positions on the Minneapolis Fire Department until var-

ious racially discriminatory practices are corrected as directed in the trial court's decree and providing for absolute minority preference in employment of twenty minority persons.

This action for injunctive and declaratory relief was brought by five Blacks on behalf of themselves and all persons similarly situated. The classes represented by plaintiffs are:

(a) All those Black, Indian and other minority persons presently applying for employment with the Minneapolis Fire Department.

(b) All those Black, Indian and other minority persons in the City of Minneapolis who are not applicants for employment with the Minneapolis Fire Department either because their applications were not approved or because they believed that equal employment opportunity is denied to Black, Indian and other minority applicants for such employment.

For convenience the plaintiffs and the classes they represent will usually be referred to as minority persons.

The defendants, who are sued in their official capacity and individually, are Gallagher, Glover and Canfield, the members of the Civil Service Commission of the City of Minneapolis; Proctor, the Personnel Director of the Commission; and Fire Chief Hall.

The court permitted the case to proceed as a class action. No challenge is made to class representation.

The Minneapolis Commission on Human Relations has intervened on behalf of plaintiffs. Fire Fighters Association of Minneapolis, Associated Fire Fighters of Minnesota and International Association of Fire Fighters have jointly filed amici curiae brief in support of defendants' position.

Included in the petition is another class represented by plaintiffs Harris and Hill consisting of:

(c) All those persons who would qualify as veterans pursuant to Minnesota Statute 197.45 in seeking to claim a veterans' preference pursuant to said section but for the state and local durational residency requirements imposed therein.

The class "c" plaintiffs make the contention that the five-year durational residency requirement incorporated in the definition of veterans in the Veterans Preference Act, Minnesota Statute 197.45, unconstitutionally imposes a penalty on the right to travel interstate. A three-judge court was designated to try such issue and hence the issue is not adjudicated in the present action. Judge Larson, who tried this case, entered a temporary restraining order prohibiting defendants from denying veterans preference under § 197.45 to any applicant for employment by reason of failure to meet residence requirements incorporated in the statute. Appeal from the granting of the temporary restraining order has been taken. However, no attack on the order is made in the briefs, and hence we give such issue no consideration at this time.[1]

Plaintiffs assert that the recruitment, examination and hiring practices of defendants with respect to the fire department deny Blacks, Indians and other members of minority groups the right to due process of law and equal protection of the law guaranteed by the Fourteenth Amendment and the right not to be discriminated against in employment by reason of race as guaranteed by 42 U.S.C.A. § 1981.

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[1]We are informed that the designated three-judge court by order filed August 6, 1971, determined that the § 197.45 issue could be resolved by a single judge and dissolved itself. No further action has been taken on this issue.

This case was tried to the court. Much of the evidence was stipulated. An evidentiary hearing was held, a number of witnesses were produced and examined. The evidence to the extent necessary will be discussed in the course of the opinion.

Judge Larson made 146 findings of fact, which generally upheld plaintiffs' contentions, and appropriate conclusions of law. Based thereon, he entered a decree, not reported, on March 9, 1971, which reads as follows:

> "The plaintiffs have moved this Court for various injunctive orders requiring the defendants to implement certain hiring practices and procedures with respect to the position of fire fighter within the Minneapolis Fire Department. The plaintiffs have also moved the Court to request the convening of a three-judge court to hear and determine the constitutionality of the five-year State and local residency requirement incorporated in the Minnesota Veterans Preference Act and to enjoin the enforcement of the requirement of said Act pending the hearing and determination of the three-judge court.
>
> "On the basis of the record and the proceedings herein, the evidence presented to the Court, the arguments of counsel, and the findings of fact and conclusions of law filed in this case this date, it is the ORDER, JUDGMENT and DECREE of this Court:
>
> "1. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, give absolute preference in certification as fire fighters with the Minneapolis Fire Department to twenty (20) Black, American-Indian, or Spanish-surnamed-American applicants for fire fighter who qualify for such positions on the basis of the examinations given pursuant to the Minneapolis Civil Service Commission fire fighter examination plan number 8326, or subsequent examination plans, and who meet the requirements of said examination plans as amended pursuant to paragraph seven (7) of this Decree.

"2. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them,

(a) establish an eligibility list of all Black, American-Indian, or Spanish-surnamed-American applicants for the position of fire fighter with the Minneapolis Fire Department who qualify for such positions on the basis of the examinations given pursuant to the Minneapolis Civil Service Commission fire fighter examination plan number 8326 and who meet the requirements of said examination plan as amended pursuant to paragraph seven (7) of this Decree, and

(b) rank said minority applicants in order of their relative standing on said examinations with those persons eligible for a veterans preference or for a residence preference given such preference on said eligibility list, and

(c) proceed with the certification of fire fighter applicants from the full eligibility list established on the basis of said examinations only after twenty positions have been filled from the eligibility list established pursuant to paragraph 2(a) of this Decree or after all persons on the eligibility list established pursuant to paragraph 2(a) of this Decree have been offered certification for the position of fire fighter with the Minneapolis Fire Department and have had a period of five (5) business days within which to accept or reject such certification.

(d) in the event that all preferred minority positions are not filled from the register established by examination plan number 8326, the same procedure will be followed on succeeding examination plans until all such twenty (20) preferred positions are filled by minority applicants.

"3. That the defendants herein, their successors in office, agents, servants and employees, and all persons in active concert or participation with them, are enjoined from enforcing the provisions of Minnesota Stat-

utes § 197.45 and the provisions of the Minneapolis City Charter, chapter 19, sections 7 and 15, insofar as such enforcement is in conflict with the Order of the Court contained in paragraph one (1) of this Decree.

"4. That the defendants Gallagher, Canfield, Glover, Proctor, and White, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall reopen the application period for the next examination for the position of fire fighter for the primary purpose of receiving applications from Blacks, American-Indians, or Spanish-surnamed-American persons for a period of two weeks to commence forthwith upon the completion and implementation of the affirmative recruitment program required pursuant to paragraph five (5) of this Decree.

"5. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall prepare and submit to the Court and counsel for the plaintiffs and the plaintiff-intervenor, no later than two weeks from the date of this Decree a plan for affirmative action for the recruitment of Black, American-Indian, and Spanish-surnamed-American persons for the position of fire fighter with the Minneapolis Fire Department, which plan shall include:

(a) Provision for the active participation in such affirmative action program of all the defendants in this action,

(b) Provision for consultation by the defendants herein and members of the staff of the Minneapolis Civil Service Commission with representatives of the City and community agencies and groups which have direct contact with the minority community in Minneapolis, and

(c) Provision for pretest tutoring sessions involving personnel from the Civil Service Commission staff and from the Minneapolis Fire Department, and

(d) Provision for the maximum feasible use of all communication media most likely to reach the minority community in Minneapolis, and

(e) Incorporation in the promotional material used, including all advertising used, of a statement referring to the Court's Order granting a minority preference as set forth in paragraph one (1) of this Decree, a statement regarding all changes made in examination plan number 8326 as set forth in paragraph seven (7) of this Decree, and a statement regarding the availability of pretesting tutoring sessions established pursuant to paragraph 5 (c) of this Decree.

"6. That the defendants Gallagher, Canfield, Glover, Proctor and White, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall not give examinations pursuant to the Minneapolis Civil Service Commission examination plan number 8326 until the following action has been taken:

(a) The written examination for fire fighter with the Minneapolis Fire Department given pursuant to said examination plan has been validated by procedures commensurate with those set forth in the Equal Employment Opportunity Commission Guidelines on Employment Testing Procedures set forth in 35 F.R. 12333, et seq. (Aug. 1, 1970), 29 C.F.R. §§ 1607.1 to 1607.14, and

(b) The Court and counsel for the plaintiffs and the plaintiff-intervenor have been given copies of said written examination for fire fighter with the Minneapolis Fire Department and copies of all reports, including a resumé of any oral reports, which are made by the defendants, their employees, or any consultant working with them, regarding validation studies of said written examination, provided that such copies of said written examination and such copies of said reports may be given to the Court and counsel for the plaintiffs and the plain-

tiff-intervenor subject to a protective order in a form approved by the Court, and

(c) Counsel for the plaintiffs and the plaintiff-intervenor have been given notice at least two weeks prior to the date scheduled for administration of said written examination, and

(d) All action required by paragraphs four (4), five (5), seven (7) and eight (8) of this Decree has been completed.

"7. The defendants Gallagher, Canfield, Glover, Proctor, and White, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall make the following permanent changes in the Minneapolis Civil Service Commission fire fighter examination plan number 8326 and all subsequent examination plans:

(a) Delete therefrom any reference to the applicant's arrest record, and

(b) Incorporate in said fire fighter examination plan provisions to the effect that:

(i) no person will be rejected as an applicant for the position of fire fighter with the Minneapolis Fire Department by reason of the conviction of any felony or felonies at any time prior to five years from the date of application or by reason of the conviction of any misdemeanor or misdemeanors at any time prior to two years from the date of application, provided that the applicant was not incarcerated upon the conviction of any felony or misdemeanor during said five or two-year periods, and

(ii) no person will be rejected as an applicant for the position of fire fighter with the Minneapolis Fire Department by reason of the conviction of any felony, misdemeanor, or other criminal act, or the conviction of felonies, misdemeanors, or other criminal acts, except upon a written finding by the Civil Service Commis-

sion after notice to the applicant and an opportunity to respond in person or in writing that

a. the act or acts upon which such convictions were based, considering the circumstances in which it occurred, involve behavior from which it can reasonably be inferred that such applicant cannot adequately fulfill the duties of a fire fighter with the Minneapolis Fire Department.

(c) Delete from said fire fighter examination plan the requirement that an applicant must have a high school diploma or a G.E.D. certificate by the time he is hired, provided that an entering fireman may be required within two years of entering upon duty to obtain a high school diploma or a G.E.D. equivalency certificate, and

(d) Change the minimum age requirement as stated in said fire fighter examination plan from twenty years to eighteen years, and change the maximum age limit from thirty years to thirty-five years, provided that the maximum age may be reduced to thirty at such time as there are twenty Blacks, American-Indians and Spanish-surnamed-Americans employed by the Minneapolis Fire Department.

"8. That the defendants, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall

(a) refrain from requesting or considering any information regarding an applicant's arrest record when determining the eligibility of an applicant for a position with the Minneapolis Fire Department, and

(b) incorporate all the changes ordered in Minneapolis Civil Service Commission fire fighter examination plan number 8326 pursuant to paragraph seven (7) of this Decree in all information, pamphlets, announcements or other material utilized as

part of the affirmative recruitment program undertaken pursuant to paragraph five (5) of this Decree.

"9. That the defendants herein, their successors in office, agents, servants, and employees, and all persons in active concert or participation with them, shall

(a) within six months of the date of the Order, submit to the Court and counsel for the plaintiffs and the plaintiff-intervenor, a plan for affirmative action to assure that all recruitment, examination, and hiring practices followed in obtaining employees for the Minneapolis Fire Department are designed to assure equal employment opportunities for Blacks, American-Indians, and Spanish-surnamed-Americans, which affirmative plan shall include procedures commensurate with the Equal Employment Opportunity Commission Guidelines on Employment Testing Procedures set forth in 35 F.R. 12333, et seq. (Aug. 1, 1970), 29 C.F.R. §§ 1607.1-1607.14 to insure that all examinations given to applicants for employment with the Minneapolis Fire Department are validated to insure that they do not discriminate against Blacks, American-Indians, and Spanish-surnamed-Americans, and that the results obtained will provide a reasonable prediction of job performance with the Minneapolis Fire Department, and

(b) to report forthwith to the Court and counsel for the plaintiffs and the plaintiff intervenor the number and names of all Blacks, American-Indians, and Spanish-surnamed-Americans who are certified as fire fighters pursuant to fire fighter examination number 8326, and

(c) to report forthwith to the Court and counsel for the plaintiffs and plaintiff-intervenor the names of all Black, American-Indian, and Spanish-surnamed-American applicants who are not found eligible for certification as fire fighters with the Minneapolis Fire Department or who, after being found eligible for such certification, are not in fact

certified at any time when eligible candidates are being certified, together with a statement as to the reasons for the failure to find such applicants eligible or the failure to certify them, and

(d) to report forthwith to the Court and counsel for the plaintiffs and the plaintiff-intervenor the name of any Black, American-Indian, or Spanish-surnamed-American applicant for fire fighter with the Minneapolis Fire Department who, having been certified for such employment, subsequently is dismissed or who subsequently terminates his employment, together with a statement as to the reason for such dismissal or termination.

"10. That the Court shall maintain continuing jurisdiction of this action."

(Paragraph 11 relates to the temporary restraining order on the § 197.45 issue, the attack upon which was not pursued in the present appeal.)

Judge Larson on April 4, 1971, entered an order for stay pending appeal, reading:

"Defendants move for an Order staying the Decree, particularly paragraphs 1 through 10, pending the appeal.

"Plaintiffs move for an Order to Show Cause why defendants should not be held in contempt for failure to comply with paragraph (5) of the Decree entered March 9, 1971.

"The recent decision of the United States in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), indicates paragraph 6(a) must be complied with. The Court understands that defendants are proceeding with the revision in tests and the validation thereof.

"IT IS ORDERED:

1. That defendants comply with paragraphs 6(a), (b) and (c) of the Decree of March 9, 1971.

2. That the defendants comply with paragraph (5)

of the Decree and submit such plan within two weeks of the completion of the validation of the tests.

3. That the motion for a stay be granted except as provided in 1 and 2, above."

Defendants urge that the court's judgment and decree should be reversed and vacated for the following reasons:

I. The District Court lacks jurisdiction to determine plaintiffs' claims.

II. Substantial evidence is lacking to support certain specified findings of fact, the resulting conclusions of law, and the decree and judgment.

III. The court wrongly deprived the Civil Service Commission of discretionary powers vested in it under the provisions of the Minneapolis Home Rule Charter and the rules of the Minneapolis Civil Service Commission.

IV. The court abused its discretion in granting injunctive relief since the record shows the Commission has taken steps to insure that the examination and other employment standards will not be discriminatory.

V. The court erred in ordering absolute minority preference in employment of twenty minority persons.

VI. The court erred in granting other injunctive relief.

Such contentions will be considered in the order just stated.

I.

Jurisdiction is based upon 28 U.S.C.A. §§ 1331 and 1343 (3) and (4). Defendants attack the jurisdiction of the trial court upon several grounds, all of which lack merit. Plaintiffs do not base jurisdiction on Title 7 of the Civil Rights Act of 1964. Hence the question of whether defendants come within the exclusion of a state or political subdivision there-

of from the definition of employer incorporated in Title 7 is immaterial. The claim of immunity from suit by public officials if it exists does not defeat plaintiffs' right to injunctive relief against state officials in their individual capacities where such officers have acted to deprive a person of a federally guaranteed constitutional right. *Ex parte Young*, 209 U.S. 123, 167, 28 S.Ct. 441, 52 L.Ed. 714; *Board of Trustees of Arkansas A & M College v. Davis*, 8 Cir., 396 F.2d 730, 732-33.

No claim for monetary damages is presented in this case. No exhaustion of state remedies is required under the circumstances of this case. See *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 5 L.Ed.2d 492. Jurisdiction is established under the old Civil Rights Act, 42 U.S.C.A. §§ 1981 and 1983, and 28.U.S.C.A. § 1343(3) and (4). See *Smith v. Board of Education of Morrilton Sch. Dist.*, 8 Cir., 365 F.2d 770, 773; *Penn v. Stumpf*, N.D.Cal., 308 F.Supp. 1238. The petition alleges the amount in controversy for each person discriminatorily denied employment exceeds $10,000. Thus federal question jurisdiction would also appear to be established under 28 U.S.C.A. § 1331.

II.

Defendants urge that some 27 specified findings of fact out of the 146 findings made by the trial court are not supported by substantial evidence. Such argument is summarily made. We have carefully examined the record and are convinced that the procedures existing prior to the commencement of this suit for testing applicants' eligibility for a fireman's position were racially discriminatory. The evidence shows that of the 335 men in the fire department none are Black, Indian or Mexican-Americans. Only two Blacks had served on the fire department in the recent past. Blacks constituted

6.44% of the Minneapolis population in 1970. The court found the all-White fire department was the result of past discriminatory hiring practices and procedures. Statistical evidence can make a prima facie case of discrimination. *Parham v. Southwestern Bell Telephone Co.*, 8 Cir., 433 F.2d 421, 426. The court found that there was no substantial evidence to rebut the inference of racial discrimination based upon the statistics.

Subsequent to the commencement of this action, the record reflects that the Commission recognized that its written examination was racially discriminatory. Substantial changes were made in its content. Consideration of the arrest record *of applicants was eliminated and other changes were made.* The record shows that Fire Chief Hall took a strong position against recruitment and employment of Blacks.

The court made no express finding of bad faith or evil motives on the part of the defendants. Neither 42 U.S.C.A. §§ 1981 nor 1983 incorporates any requirement that discrimination be wilfull or intentional. In an analogous situation arising under Title 7 of the Civil Rights Act, the Supreme Court states: "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L. Ed.2d 158 (March 8, 1971).

Defendants' own testimony affirmatively shows the testing procedure in issue prior to the commencement of the action was racially discriminatory.

III.

The city of Minneapolis is governed by a Home Rule Charter under which it is authorized to establish a civil service

system for the city. The Minnesota Supreme Court in *State ex rel. Coduti v. Hauser*, 219 Minn. 297, 17 N.W.2d 504, 507, holds:

> "'The rules of the Commission, having all the force and effect of statutory law, should be sustained unless they violate constitutional guaranties, controlling state legislation or the provisions of the [Minneapolis home-rule] charter pursuant to which they were adopted.'"

The Commission, like school boards in school integration cases, has the primary responsibility for carrying out the duties assigned to it and has a large discretion in mapping the course it is to follow. However, such discretionary power does not go to the extent of authorizing the adoption of rules and procedures which violate constitutional rights of minority persons seeking employment. We have heretofore determined that the constitutional rights of minority persons have been violated by the present procedures adopted by the Commission.

IV.

Defendants contend that the court abused its discretion in granting injunctive relief and usurped the Commission's power to promulgate rules and regulations with respect to firemen's qualifications and examinations. Defendants, who are the present members of the Civil Service Commission, ever since their recent appointment have discussed their rules and examinations with civic groups and interested parties and have made changes in their rules designed to eliminate racial discrimination, and they have agreed to employ competent experts to validate future examinations and to take steps to promote recruitment of minority persons for firemen positions. In effect, they have expressed a willingness to substantially comply with the provisions of paragraphs 5 and 6 (a), (b) and (c), of the decree heretofore quoted which

are the provisions the court excluded from the operation of its stay order pending appeal. Defendants have also eliminated any consideration of arrests in determining applicants' qualifications and have made modifications in the educational and age requirements. Defendants take the position that such steps have eliminated any need for injunctive relief.

Generally the granting or denial of an injunction to remedy illegal conduct in situations where good faith effort has been made to remedy the wrong rests in the sound discretion of the trial court. *Parham v. Southwestern Bell Telephone Co.*, 8 Cir., 433 F.2d 421, 429; *Hodgson v. American Can Co.*, 8 Cir., 440 F.2d 916, 920.

Upon the record before us, defendants have not demonstrated that the court abused its discretion in granting injunctive relief.

V.

Defendants' most vigorous attack upon the injunction decree is directed toward paragraph 1 creating absolute preference in fire department employment to twenty minority persons who meet the qualifications for the position under the revised qualification standards established by the decree. Paragraphs 2 and 3 of the decree implement the provisions of paragraph 1.

Defendants contend that such minority preference order violates the Fourteenth Amendment in that it discriminates against White applicants whose qualifications are found to be superior to those of the minority applicants upon the basis of approved and acceptable job related tests and standards, and who, but for the minority preference requirement, would be entitled to priority in employment.

Plaintiffs, citing *Louisianna v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709, and *Swann v. Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), urge that the District Court has the power and duty to exercise its equitable powers to fashion a remedy which will so far as possible eliminate the present effects of past discrimination as well as bar like discrimination in the future.

Courts of equity have a broad power to fashion an effective remedy. However, the power to provide an effective remedy affords no basis for depriving others of a constitutionally protected right. Plaintiffs in effect concede this in their brief when they state: "Initially, we assume the obvious—that the District Court could not order the city official to take any action which would itself be unconstitutional."

Thus we reach the crucial question which is whether giving absolute preference to twenty minority applicants who meet the qualification tests infringes upon the constitutional rights of White applicants whose qualifications are established to be superior. The trial court based the minority preference on violation of 42 U.S.C.A. § 1981 which reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Plaintiffs in their brief properly state the law as follows:

> "For the past 90 years the Supreme Court has recognized that the Congress intended section 1981 to have as broad a scope as the Fourteenth Amendment where state action is involved. In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), the Court stated with respect to Rev. Stat. 1977 (now section 1981) that 'this Act puts in the form of a statute what had been sub-

> stantially ordained by the Constitutional Amendment.' 100 U.S. at 312. In context the Court is referring to the Fourteenth Amendment. On the same day, in *Virginia v. Rives*, 100 U.S. 313, 317-18, 25 L.Ed. 667 (1880), the Court treated the Civil Rights Act and the Fourteenth Amendment as coextensive in substance. The close relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment has been consistently emphasized by the Court. . . ."

Section 1981 and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. We believe that § 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks. Our view is supported by *Griggs*, supra, where it is held:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. 424, 430-31, 91 S.Ct. 849, 853.

Under the charter and the civil service provisions properly administered, preference is to be accorded to the fire fighter applicant having the highest rating. Under the court's minority preference provision, a White person who, in a subsequently conducted examination fairly conducted and free of racial discrimination, obtains a higher rating than a minority person is denied employment solely because he is a White man. The fact that some unnamed and unknown

White person in the distant past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preference over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified applicant upon the basis of race.

In our view, no authority has been cited which would support such racial discrimination. We are convinced that the minority preference provision of the decree discriminates in favor of minority persons and against Whites whose qualifications are fairly established to be superior to minority persons given preference by the decree.

School integration cases such as *Swann*, supra, are clearly distinguishable. Whites have no constitutional right to insist upon segregated schools. No constitutional rights of Whites are involved in decrees ordering school integration.

Cases such as *Local 53 of Int. Ass'n of Heat & Frost I. & A. Workers v. Vogler*, 5 Cir., 407 F.2d 1047, are distinguishable. In *Vogler*, the court upheld the trial court's finding that three Blacks and one Mexican had applied for union membership and had been discriminatorily denied membership solely upon the basis of their race. The court ordered the union to give such identified persons union membership. The relief was granted to specific persons who were wrongly denied membership. Moreover, the issue of reverse discrimination was not raised or considered by the court.

In our present case, there is no claim or showing made that plaintiffs were identified members of the class who made prior applications for employment and were denied employment solely because of race. Thus we do not have a situation where a specified minority person having superior qualifications to a White fire fighter applicant has shown that he,

himself, has been damaged or injured by a discriminatory refusal of employment.

VI.

Defendants claim the injunctive relief granted is too broad in other respects. In *Griggs*, supra, the standard laid down for determining the validity of tests and job standards is thus stated:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431, 91 S.Ct. 849, 853.

Such standard is appropriate to test the relief granted upon the basis of the record made in this case. We shall proceed to examine and determine the validity of the relief granted in paragraphs 4 to 10, inclusive, of the decree, supra.

We affirm and approve the provisions of paragraphs 4 and 5 requiring the reopening of applications for the next examination and the requirement that an affirmative plan for recruitment of minority persons be promptly submitted to the court for approval. We disapprove, however, of that part of paragraph 5(e) which requires publicity for the minority preference provision which we have heretofore disapproved.

The provisions of paragraph 6 are approved and affirmed except for the modification of paragraph 6(d) to the extent that it is consistent with the views expressed in this opinion.

The provisions of paragraph 7(a) relating to the elimination of applicants' arrest records is approved.

The provisions of paragraph 7(b), particularly subdivision (i) thereof, are too broad. The parties agree that a conviction of a felony or misdemeanor should not per se consti-

tute an absolute bar to employment. We are persuaded by defendants' argument that applicants' conviction records, at least in cases of aggravated offenses and multiple convictions, may have a bearing on the suitability of an applicant for a fire department position both from the standpoint of protecting fellow firemen and the public. The trial court in its discretion may require the defendants to submit to it for approval a rule with respect to the consideration to be given to an applicant's conviction record, which at a minimum should not treat conviction as an absolute bar to employment. We would not consider any rule giving fair consideration to the bearing of the conviction upon applicant's fitness for the fire fighter job to be inappropriate.

The provisions of paragraph 7(c) relating to educational requirements are approved and affirmed. We note that no complaint is made that the court did not go far enough in this respect.

The provision of paragraph 7(d) reducing the minimum age requirement is disapproved. Absent racial discrimination, it is appropriate for employers to fix age requirements. There is no adequate evidentiary basis to support a finding that the minimum age requirement is racially discriminatory.

By reason of past racial discrimination, we approve the 7(d) temporary enlargement of the maximum age requirement from thirty to thirty-five years.

The provisions of paragraph 8 are adequately covered by other provisions of the decree.

By reason of the lapse of time from the entry of the decree and the likelihood that changes have subsequently been made, the provisions of paragraph 9 of the decree can to the extent necessary be best realized under the continuing jurisdiction provisions of paragraph 10.

We agree that the court should maintain continuing jurisdiction of this action for a sufficient period of time to reasonably assure it that racial discrimination has been eliminated in filling positions on the fire department. The court may require such reports and information as it deems necessary and issue such orders as may be required to accomplish the objective of eliminating racial discrimination in the employment of fire fighters.

The trial court's determination that past racial discrimination against minority persons applying for fire fighters' positions has been established is affirmed. The court's decree to the extent that it gives absolute preference to twenty applicants is reversed and vacated. In other respects, the court's decree and judgment is affirmed to the extent indicated in this opinion.

The case is remanded for further proceedings consistent with the views herein expressed.

Costs are taxed two-thirds to defendants-appellants and one-third to plaintiffs-appellees.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1181

Gerald Carter, et al.,
Plaintiffs-Appellees,

and

Minneapolis Commission on Human Relations,
Plaintiff-Intervenor-Appellee,

vs.

Hugh Gallagher, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the District of Minnesota—On Petition for Rehearing En Banc.

January 7, 1972.

Before MATTHES, Chief Judge, VAN OOSTERHOUT, Senior Circuit Judge, MEHAFFY, GIBSON, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, En Banc.

GIBSON, Circuit Judge.

A panel of this court composed of Matthes, Chief Judge, Van Oosterhout, Senior Judge, and Eisele, District Judge from the Eastern District of Arkansas sitting by designation, in an opinion, authored by Judge Van Oosterhout,[1]

[1]No. 71-1181. September 9, 1971.

sustained the order and opinion of the Honorable Earl R. Larson, District Court of Minnesota, finding that the employment practices and procedures for determining qualifications of applicants for positions on the Minneapolis Fire Department were racially discriminatory in violation of the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1870, 42 U.S.C. § 1981, and approved a number of corrective practices ordered so as to eliminate all racially discriminatory practices; but disapproved that part of Judge Larson's order providing for absolute minority preference in the employment of the next 20 persons to be hired by the department. The case was brought as a class action and relief was extended to minority groups as a class.

The panel opinion, while sustaining most of Judge Larson's findings and orders granting affirmative relief, did not approve of the absolute preference in Fire Department employment to 20 minority persons who met the qualifications for the positions under the revised qualification standards established by the decree and held that the absolute preference order infringed upon the constitutional rights of white applicants whose qualifications are established to be equal or superior to the minority applicants. That panel held:

> "Section 1981 and the Fourteenth Amendment by their plain and unambiguous language accord equal rights to all persons regardless of race. We believe that § 1981 and the Fourteenth Amendment proscribe any discrimination in employment based on race, whether the discrimination be against Whites or Blacks. Our view is supported by *Griggs*, supra, where it is held:
>
> > 'Congress did not intend by Title VII, however to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a

> member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' 401 U.S. 424, 430-31, 91 S.Ct. 849, 853, 28 L.Ed.2d 158."

A petition for rehearing en banc by the appellees was granted but limited solely to the issue of the appropriate remedy. The cause was resubmitted to the court en banc on briefs of the various parties and intervenors and without oral argument. The United States filed a brief as amicus curiae on behalf of the plaintiffs on the rehearing.

The facts are contained in the panel opinion and need not be repeated here. The fact of past racially discriminatory practices and procedures in employment by the Fire Department is accepted and clearly evidenced by the fact that of the 535 men in the Fire Department none are from minority groups.[2] We are thus here concerned only with the appropriateness of the remedy ordered by the District Court. The absolute preference of 20 minority persons who qualify has gone further than any of the reported appellate court cases in granting preference to overcome the effects of past discriminatory practices and does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified.

The panel opinion has recognized the illegality of the past practices, has ordered those practices abandoned, and the affirmative establishment of nondiscriminatory practices

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[2]The total minority population of the Minneapolis area was 6.44 per cent in 1970; black population 4.37 per cent.

and procedures. There is, as the panel pointed out, no claim or showing made that the plaintiffs were identifiable members of the class who had made prior applications for employment and were denied employment solely because of race. This latter situation could be remedied immediately by ordering the employment of such persons. However, in dealing with the abstraction of employment as a class, we are confronted with the proposition that in giving an absolute preference to a minority as a class over those of the white race who are either superiorly or equally qualified would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

The defendants-appellants point out the mandatory requirements of the Minneapolis City and the Minnesota Veterans' Preference Act (Minnesota Statute 197.45). These requirements however must give way to the Supremacy Clause of Article 6 of the United States Constitution.

Mr. Justice Black, in speaking for a unanimous court (although Mr. Justice Harlan concurred on the basis of the Fifteenth Amendment rather than on the Fourteenth) in *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1964), approved the suspension of Louisiana voting laws that had been administered discriminatorily against Negroes and held it was the affirmative duty of the district court to eliminate the discriminatory effects of past practices, stating, "We bear in mind that the court has not merely the power but the duty to render a decree which so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." 380 U.S. at 154, 85 S.Ct. at 822. It is apparent that remedies to overcome the effects of past discrimination may suspend valid state laws. *United States v. Mississippi*, 339 F.2d 679

(5th Cir. 1964); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1963).

Admittedly the District Court has wide power sitting as a court of equity to fashion relief enforcing the congressional mandate of the Civil Rights Acts and the constitutional guarantees of the Equal Protection of the Law; and clearly, courts of equity have the power to eradicate the effects of past discriminations. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1971). We are not here concerned with the anti-preference treatment section 703 (j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j),[3] as this class action is predicated under § 1981 of the old Civil Rights Act and the provisions of the Fourteenth Amendment. However, even the anti-preference treatment section of the new Civil Rights Act of 1964 does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices. *United States v. IBEW, Local No. 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970).

Although this case is not predicated upon Title VII of the Civil Rights Act of 1961 and most of the cases that have

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[3] 42 U.S.C. §2000e-2(j) provides as follows:

"Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

dealt with the issue of remedying past discriminatory practices along with prohibiting present discriminatory practices are under that Act, the remedies invoked in those cases offer some practical guidelines in dealing with this issue.

As the panel opinion points out most of these cases deal with discriminations to a specified individual who has been presently discriminated against on account of race, and the remedy is there easily applied as the individual who has been discriminated against can be presently ordered employed without running into the constitutional questions involved in granting preference to any one class over another. However, in *United States v. Iron Workers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied* 404 U.S. ....., 92 S.Ct. 447, 30 L.Ed.2d 367 (1971), the Ninth Circuit approved the district court decree ordering building construction unions to offer immediate job referrals to previous racial discriminatees and also approved a prospective order requiring the unions to recruit sufficient blacks to comprise a 30 per cent membership in their apprenticeship programs. This was ordered in Seattle which had a black population of approximately 7 per cent. See *United States v. Local No. 86, Int. Ass'n of Bridge S., D. and R. Iron Workers, et al.*, 315 F. Supp. 1202 (W.D.Wash. 1970).

In *Local 53 of Int. Ass'n of Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), the trial court ordered the immediate admission into the union of three Negroes who were racially discriminated against in their application for membership and voided a local membership rule that in effect made the union a self-perpetuating nepotistic group, specifically ordering the union to develop objective criteria for membership and prospectively ordering the alternating of white and Negro referrals.

In *United States v. Central Motor Lines, Inc.*, 325 F.Supp. 478 (W.D.N.C. 1970), the trial court issued a preliminary injunction requiring the motor carrier to hire six Negro drivers "promptly," (apparently within two weeks from the date of the order), and that any future drivers hired were to be in an alternating ratio of one black to one white.

Cases arising from Executive Order #11246, prohibiting all contractors and subcontractors on federally financed projects from discriminating in their employment practices, have also upheld plans which establish percentage goals for the employment of minority workers. See *Contractors Association of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971) (upholding the "Philadelphia Plan" requiring minority employment goals in the construction trades ranging from 19 per cent - 26 per cent); *Joyce v. McCrane*, 320 F.Supp. 1284 (D.N.J. 1970) (requiring contractors to employ 30 per cent - 37 per cent minority journeymen).

It is also appropriate to note that precedent from our own Circuit establishes that the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination. In *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123 (8th Cir. 1969), we required substantial changes in union referral systems. In connection with this holding, Judge Heaney noted:

> "We recognize that each of the cases cited in n. 15 to support our position can be distinguished on the ground that in each case, a number of known members of a minority group had been discriminated against after the passage of the Civil Rights Act. Here, we do not have such evidence, but we do not believe that it is necessary. The record does show that qualified Negro tradesmen have been and continue to be residents of the area. It further shows that they were acutely aware of the Lo-

cals' policies toward minority groups. It is also clear that they knew that even if they were permitted to use the referral system and become members of the union, they would have to work for at least a year before they could move into a priority group which would assure them reasonably full employment. In the light of this knowledge, it is unreasonable to expect that any Negro tradesman working for a Negro contractor or a non-construction white employer would seek to use the referral systems or to join either Local." *Id.* at 132.

It may also be pointed out that in actions under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., Congress has specifically granted authority to the trial courts to "order such affirmative action as may be appropriate, which may include * * * *hiring of employees* * * *." 42 U.S.C. §2000e-5(g) (emphasis added).

None of the remedies ordered or approved in the above cases involved an absolute preference for qualified minority persons for the first vacancies appearing in an employer's business, in contrast to the remedy ordered in the instant case. The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racially discriminatory practices. *Louisiana v. United States, supra.* To accommodate these conflicting considerations, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area. Such a procedure does not constitute a "quota" system

because as soon as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis, and it could well be that many more minority persons or less, as compared to the population at large, over a long period of time would apply and qualify for the positions. However, as a method of presently eliminating the effects of past racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination, more than a token representation should be afforded. For these reasons we believe the trial court is possessed of the authority to order the hiring of 20 qualified minority persons, but this should be done without denying the constitutional rights of others by granting an absolute preference.

Ideas and views on ratios and procedures may vary widely but this issue should be resolved as soon as possible. In considering the equities of the decree and the difficulties that may be encountered in procuring qualified applicants from any of the racial groups, we feel that it would be in order for the district court to mandate that one out of every three persons hired by the Fire Department would be a minority individual who qualifies until at least 20 minority persons have been so hired.

Fashioning a remedy in these cases is of course a practical question which may differ substantially from case to case, depending on the circumstances. In reaching our conclusion in the instant case, we have been guided to some extent by the following considerations:

(1) It has now been established by the Supreme Court that the use of mathematical ratios as "a starting point in the process of shaping a remedy" is not unconstitutional and is "within the equitable remedial discretion of the District

Court." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971).

(2) Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis.

(3) As the panel opinion noted, testing procedures required to qualify applicants are undergoing revision and validation at the present time. As the tests are currently utilized, applicants must attain a qualifying score in order to be certified at all. They are then ranked in order of eligibility according to their test scores (disregarding for present purposes the veterans' preference). Because of the absence of validation studies on the record before us, it is speculative to assume that the qualifying test, in addition to separating those applicants who are qualified from those who are not, also ranks qualified applicants with precision, statistical validity, and predictive significance. See generally, Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1637-1669 (1969). Thus, a hiring remedy based on an alternating ratio such as we here suggest will by no means necessarily result in hiring less qualified minority persons in preference to more qualified white persons.

(4) While some of the remedial orders relied on by the plaintiffs and the Government ordered one to one ratios, they appear to be in areas and occupations with a more substantial minority population than the Minneapolis area. Thus

we conclude that a one to two ratio would be appropriate here, until 20 qualified minority persons have been hired.

The panel opinion is adopted as the opinion of the court en banc with the exception of that part relating to the absolute preference.

The District Court properly retained jurisdiction pending full implementation of its decree and the remedy. Cause is remanded for further proceedings consistent with this opinion.

All costs of the appeal are to be assessed three-fourths against the defendant-appellants and one-fourth against the plaintiffs-appellees.

MATTHES, Chief Judge, concurring.

As the panel opinion shows, I was opposed to the absolute preference requirement as enunciated in the district court's opinion. Upon consideration of the petition for rehearing en banc, and briefs filed in support and opposition to the rehearing, I have concluded that the remedy fashioned by the opinion authored by Judge Gibson is appropriate and should be granted. Accordingly, I concur in the majority opinion on the petition for rehearing en banc.

VAN OOSTERHOUT, Senior Circuit Judge, dissenting.

For reasons stated in Division V of the panel opinion in this case, reported at 452 F.2d 324, I dissent from the en banc mandatory determination that one out of three persons hired by the Fire Department shall be a minority person until at least twenty minority persons are hired. Such provision in my opinion is vulnerable to the same constitutional infirmity as Judge Larson's absolute preference provision. This court's minority preference provision will not discriminate against as many white applicants as Judge Larson's

decree but it will still give some minority persons preference in employment over white applicants whose qualifications are determined to be superior under fairly imposed standards and tests.

Employment preferences based on race are prohibited by the Fourteenth Amendment. This case is distinguishable from *Swan v. Charlotte-Mecklenburg Board of Education* relied upon by the majority in that whites have no right to insist upon segregated schools, while white as well as Black applicants cannot be denied employment on the basis of race.

I agree that a court of equity has broad power to frame an appropriate decree but such power does not extend to establishing provisions which deprive persons of constitutionally guaranteed rights.

Present and future applicants for firemen positions are in no way responsible for past discrimination. Plaintiffs have not shown that any plaintiff now seeking employment has personally suffered as a result of past discrimination by being denied employment over a less qualified white person. Past general racial discrimination against Blacks under the circumstances of this case does not justify unconstitutional present racial discrimination against white applicants. The court should of course go as far as is constitutionally permissible to eliminate racial discrimination in employment of firemen. Substantial steps in that direction have been taken by other provisions of Judge Larson's decree and the panel opinion.

Mehaffy, Circuit Judge, joins in this dissent.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX III

THE CHARTER OF THE CITY OF MINNEAPOLIS ADOPTED AT GENERAL ELECTION OF NOVEMBER 2, 1920

CHAPTER XIX

Civil Service

(PERTINENT PROVISIONS)

Section 1. Civil Service Commissioners of Minneapolis, to be Appointed by Mayor with Approval of a Majority of City Council and to Receive Salary of $1500 Per Annum Each—Mayor to File Name of Persons Whom He Proposes to Appoint.—There shall be in the City of Minneapolis a Civil Service Commission (hereinafter called the commission) of three commissioners, who shall be citizens of the state and residents of the city, and for this service each commissioner shall receive $1500 per annum as compensation, payable in equal monthly installments. No commissioner shall at the time of his appointment, or while serving, hold any other office or employment under the city, the United States, the State of Minnesota, or any public corporation or political division thereof other than the office of Notary Public. The Mayor shall, with the consent and approval of the City Council, expressed by a majority vote thereof, appoint as commissioners, persons known to favor the principle of merit and efficiency in the public service.

Section 7. Commission to Make; Alter and Change Rules —Appointment of Non-Skilled Laborers Without Examination. The commission shall, from time to time, make, amend, alter and change rules, to promote efficiency in the city service and to carry out the purposes of this chapter. The rules shall provide, among other things, for: (City Council Ordinance 7-2-68)

a. The classification of all offices, positions and employments in the classified service.

b. Public competitive examination to test the relative fitness of applicants.

c. Public advertisement of all examinations at least ten days in advance, in at least one newspaper of the city of general circulation, and posting such advertisement a like time in a conspicuous place in the city hall. (City Council Ordinance 7-2-68)

d. The creation of lists of eligible candidates after successful examination, in the order of their standing in the examination, and without reference to time of examination. Such lists shall be embraced in an eligible register. The commission may by rule provide for striking any name from the eligible register after it has been two years thereon.

e. The rejection of candidates or eligibles who, after the entry of their names, shall fail to comply with the reasonable rules and requirements of the commission in respect to age, residence, physical condition or otherwise, or who have been guilty of criminal, infamous or disgraceful conduct, or of any willful misrepresentation, deception or fraud in connection with the examination or in connection with their applications.

f. The certification of the name standing highest on the appropriate list to fill any vacancy.

[g and h omitted.]

i. Promotion based on competitive examination and upon records of efficiency, character, conduct and seniority. Promotion shall be deemed, among other things, to include increase in salary, and the rules shall be framed to encourage the filling of vacancies by promotion rather than otherwise.

[j, k and l omitted.]

Section 12. Duties of Each Office to Be Ascertained and

Class and Grade Established. The commission shall ascertain the duties of each office, position and employment in the classified service, and designate by rule as well as may be practicable, the grade and title of each office, employment or position. Each class shall comprise those offices, employments and positions having substantially similar duties. The commission shall by rule indicate the lines of promotion from each lower to higher grade wherever the experience derived in the lower tends to qualify for the higher. The commission shall prescribe standards of efficiency for each office, position and employment and for each class, and adapt its examinations thereto. The commission shall make and keep a record of relative efficiency of each employee in the classified service other than unskilled laborers, and shall provide by rule methods for ascertaining and verifying the fact from which such records of relative efficiency shall be made. (City Council Ordinance 7-2-68).

Section 13. Conduct of Examinations. All examinations shall be impartial, fair and practical and designed only to test the relative qualifications and fitness of applicants to discharge the duties of the particular employment which they seek to fill. No question in any examinations shall relate to the race, or national origin, political or religious convictions or affiliations of the applicant. All applicants for positions of trust shall be specially examined as to moral character, sobriety and integrity, and all applicants for positions requiring special experience, skill or faithfulness shall be specially examined in respect to those qualities. Where written answers are required from applicants for positions calling for expert knowledge the rules may provide for examination of the answers and the comparative ranking of the various applicants, without a disclosure of the names of the applicants to the examiners. The commission may furnish to the

chief examiner such assistance as may be necessary. It shall be the duty of every employee of the city to act as an examiner or assistant examiner, at the request of the commission, without special compensation therefor. The members of the commission, collectively or individually, may act as examiners or assistant examiners. (City Council Ordinance 7-2-68)

Section 14. Notice of Examination. Notice of the time, place, and scope of each examination shall be given by publication and posting, as specified in section 7, and by mailing to each applicant upon the appropriate list of the application register ten days in advance. The names of those found eligible after giving credit for character and previous successful experience, shall be entered, with their addresses and percentages, in appropriate lists of the eligible register. No names shall remain upon the eligible register more than two years without a new application, and, if the rules of the commission so require, a new examination.

Section 15. Filling of Vacancies. When a vacancy is to be filled in the classified service, the Mayor, City Council, board, commission or employing officer shall notify the commission, and the commission shall certify the highest name from the appropriate list of the eligible register, except in the case of unskilled labor, and then shall certify the name first in time on the list. All vacancies shall be filled from the names so certified, and the commission shall be immediately notified of the employment, and of the compensation to be paid. The names selected shall be stricken from the eligible register and transferred to the service register. All changes in grade, title or compensation shall be likewise reported.

APPENDIX IV

RULES, CIVIL SERVICE COMMISSION OF CITY OF MINNEAPOLIS, AS AMENDED THROUGH NOVEMBER 2, 1970

(PERTINENT PROVISIONS)

5.06 *Competitive Examinations.*

All competitive examinations for positions in the classified service shall relate to those matters which will fairly test the capacity and fitness of the persons examined to discharge efficiently the duties of the office or employment sought by them. Any means or measures may be used which are reasonably well calculated to test the fitness of the candidates to become employees in positions of the class for which the examination is held.

Such means or measures may include any required statement or any investigation of education, experience, or record of accomplishment; any test of knowledge, skill, capacity, intelligence or aptitude; and any inquiry into the moral character, or any other quality or attribute which, in the judgment of the Commission, seems desirable. (C.C. XIX Sec. 13)

No test or question in any application or examination shall be constructed to call for or lead to disclosure of any information concerning any political, religious, fraternal, or racial affiliations. Any disclosure thereof shall be discountenanced, and any such information which may nevertheless be revealed, shall be disregarded.

The tests in any examination for promotion shall be of like kind and character to the corresponding tests in any examination for original appointment to positions of the same class, and the same standards shall be applied to the

rating thereof. In addition to other factors, promotional examinations shall take into consideration a rating on seniority, efficiency, character and conduct. (C.C. XIX Sec. 7)

5.08 *Concealing Identity.*

On the date of the written examination, the identification sheets of the candidates shall be sealed and the identity of each shall remain hidden until the papers have been graded, provided, that when specified ratings have been required in one or more subjects prior to the completion of the examination, the identification envelopes may be opened on the establishment of such ratings in order to notify applicants to appear for the remainder of the examination. (C.C. XIX Sec. 13)

5.09 *Subjects and Weights.*

Appropriate scientific techniques and procedures shall be used in rating the results of examinations and determining the relative rankings of the competitors. Each examination shall embrace certain subjects, to which weights shall be assigned, the weight given to each subject to represent its value in ascertaining the fitness of applicants. Each subject of examination shall be rated independently by the examiners.

The rating on the scale of 100 on each subject shall be multiplied by the weight assigned to such subject. The resulting products shall be added and the total product divided by the total weights of all subjects in the examination. The resulting quotient is the general average which shall be used in determining the order in which the name of the candidate shall appear upon the eligible register. The commission shall determine the subjects and relative weights given to each subject.

APPENDIX V

MINNESOTA STATUTES 1969

VETERANS PREFERENCE ACT, §197.45

197.45 Preference in Public Appointments. Subdivision 1. Veteran defined. The word "veteran" as used in this section and section 197.46 means any man or woman honorably discharged from the army, navy, marine corps, or Women's Auxiliary Army Corps of the United States in the Civil War, Spanish-American War, Philippine Insurrection, China Relief Expedition, or any armed expedition for which Congress has awarded a campaign badge or medal, World War wherein the United States of America and the allied nations of England, France, and others were engaged in war against the Imperial German Government and its allies, and any other person who, on or after December 7, 1941, has been honorably discharged or separated from any branch of the armed forces of the United States (1) after having served on active duty for other than training purposes or (2) by reason of disability incurred while serving on active duty, who is a citizen of the United States, and has been a resident of the state of Minnesota and of the county, city, town, village, school district, or political subdivision thereof to which application is made for five years immediately preceding his application, or who enlisted from the state of Minnesota, and persons who served in the active military or naval service of any government allied with the United States in World War I or World War II, and have been honorably discharged therefrom, and who are citizens of the United States and were such citizens at the time of entrance into such active service, and have been residents of the state of Minnesota five years immediately preceding their application or who enlisted from the state of Minnesota.

Subd. 2. Preference to war veterans in public appointments. That in every public department and upon all public works in the state of Minnesota and the counties, cities, towns, villages, school districts, and all other political subdivisions and agencies thereof, honorably discharged veterans shall be entitled to preference in appointments, employment and promotion over other applicants therefor, and the persons thus preferred shall not be disqualified from holding any position hereinbefore mentioned on account of his age or by reason of any physical disability, provided such age and disability does not render him incompetent to perform properly the duties of the position applied for and when such veteran shall apply for appointment or employment under sections 197.45 and 197.46, the officer, board or person whose duty it is, or may be, to appoint or employ such person to fill such position or place, shall before appointing or employing anyone to fill such position or place, except where said veteran has already been qualified under civil service for the position applied for, make an investigation as to the qualifications of said veteran for such place or position, and if he is of good moral character, and can perform the duties of said position applied for by him, as hereinbefore provided, said officer, board or person shall appoint said veteran to such position or place of employment.

In any governmental agency having an established civil service or merit system, no inquiry shall be made of any applicant for examination before such examination as to whether or not he is a veteran, nor shall any distinction be made in giving the examination or grading the results thereof on account of the fact that the applicant may be a veteran; provided, that this shall not abridge any preference to which such veteran is entitled. All governmental agencies when notifying the applicant that he has passed, shall inform the ap-

plicant of the right of a veteran to preference. The proper civil service or merit system authority shall certify his appointment and the appointing authority shall appoint such veteran before any other person is certified or appointed to fill a position for which the veteran has passed the examination.

A refusal to allow the preference provided for in this and the next succeeding section to any such honorably discharged veteran, or a reduction of his compensation intended to bring about his resignation or discharge, shall entitle such honorably discharged veteran to a right of action therefor in any court of competent jurisdiction for damages, and such officer and the persons responsible for such refusal if such refusal was wilful shall be personally liable therefor, and also for a remedy for mandamus for righting the wrong.

Subd. 3. Promotional examinations. In any governmental agency having an established civil service or merit system where an applicant is a veteran and he has passed the promotional examination, he may elect to have a credit of five points to the examination rating. The decision to make such election may be made either before or after the examination. If the election is made and the promotion is gained, such election shall preclude the use of a five point preference in further promotions. The name of the veteran or disabled veteran with such augmented rating shall be placed on the list of eligibles along with other eligible persons for the position or place, but the name of the veteran shall be entered ahead of a non-veteran when the ratings are the same.

Subd. 4. Widows to have rights and privileges. The widows of deceased veterans and the spouses of disabled veterans who, because of such disability, are unable to qualify, shall have all the rights and privileges given to a veteran by this section or by section 197.46.

AMICUS CURIAE BRIEF

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SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

Petitioners,

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE CHARLES STENVIG, MAYOR OF THE CITY OF MINNEAPOLIS, MINNESOTA

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TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	2
Argument	3
Conclusion	5
Appendix A—Minnesota Statutes 363.03	A-1
Appendix B—Minneapolis Code of Ordinances 945.030	A-2

TABLE OF AUTHORITIES

Cases:

	Page
Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971)	3, 4

Statutes:

42 U.S.C.A. § 1981	3

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BRIEF OF AMICUS CURIAE

CHARLES STENVIG, MAYOR OF THE CITY OF MINNEAPOLIS, MINNESOTA

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, and with the consent of the parties, which consents have been filed with the Clerk of this Court, Charles Stenvig, Mayor of the City of Minneapolis, Minnesota, respectfully files this brief as amicus curiae.

INTEREST OF AMICUS CURIAE

The interest of the Mayor of the City of Minneapolis derives from his position as chief executive officer of said City. Upon assuming the duties of such office, he took an oath to "support the Constitution of the United States, the Constitution and the Laws of the State of Minnesota, and the Ordinances of the City of Minneapolis". The relevant portions of Minnesota Statutes, Section 363.03 and Section 945.030 of the Minneapolis Code of Ordinances, are respectively set out in Appendices A and B hereto. Both prohibit discrimination based on race, national origin, or color in hiring by public or private employers.

The Mayor of Minneapolis is elected by the citizens of the City pursuant to their Home Rule Charter, which provides the following, in addition to his other duties:

> "Section 1. *Powers and Duties of Mayor.* The Mayor shall take care that the laws of the State and the ordinances of the City are duly observed and enforced within the City. He shall take care that all other officers of the City discharge their respective duties, and to that end may maintain an action of mandamus or other appropriate action against any delinquent City officer."

Administrative officials of governments, not only in Minneapolis or within the jurisdiction of the Eighth Circuit, but nation-wide, should have a decisive answer from the United States Supreme Court if prior interpretations of the Federal Constitution and Federal Civil Rights Acts as they relate to governmental employment are to be changed.

ARGUMENT

The opinion of the United States Court of Appeals for the Eighth Circuit, dated January 7, 1972, (Petitioners' Appendix II, A-23) requires the City of Minneapolis to engage in discriminatory hiring procedures. It requires that, notwithstanding the relative ability of applicants for positions in the City's Fire Department, hiring preference be given for one-third of those positions to persons of a particular color, ancestry, or having a particular type of surname. Such persons had been given absolute preference for such positions by order of the Federal District Court. The Circuit Court recognized that such order violated Federal Civil Rights Laws, and deprived equally or superiorly qualified persons not within such limited classification of their rights under the Federal Constitution. The Circuit Court then substituted its own formula for such hiring, limiting the deprivation of constitutional rights to a portion, rather than all, of the equally or superiorly qualified applicants not within such classification.

42 U.S.C.A. § 1981 provides in part "*All* persons . . . shall have the *same* right in every state . . . ." By the use of such language in the Civil Rights Act Congress has prohibited, both totally or on a partial basis, the granting of superior rights to employment to persons of a particular color, ancestry, or surname. The recent opinion of this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 158 (1971), states:

> "Congress did not intend by Title VII (of the Civil Rights Act of 1964), however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority,*

is precisely and only what Congress has prescribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

* * * * *

"Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." (Emphasis supplied.)

Such interpretation is no less applicable to the instant case than to *Griggs, supra.*

It is recognized that administrative problems and lawsuits may result from the absence of definitions in the Circuit Court opinion. Their extent and complexities are unknown at this time, but may involve questions such as:

Is the discriminatory preference in hiring to be given only to persons with totally black skin as opposed to persons of the Negro race whose skin may be dark brown? If not, where is the division line as to color?

Is the discriminatory preference to be given only to persons of one hundred per cent American Indian blood, as opposed to a person who is 31/32 Indian and 1/32 some other racial heritage? If not, where is the division line as to race?

What is a Spanish surname? How must it have been acquired?

Although such questions may seem facetious, they are of concern to administrators who must, under the Circuit Court opinion, discriminate in the hiring of individuals on the basis of their color, race, or surname.

CONCLUSION

Equal opportunity for employment cannot be equated to minority preferences. The citizens of Minneapolis should be permitted to hire for its Fire Department the most highly qualified applicants, notwithstanding their color, race or surname.

A Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

Minnesota Statutes

"363.03. UNFAIR DISCRIMINATORY PRACTICES. Subdivision 1. *Employment.* Except when based on a bona fide occupational qualification, it is an unfair employment practice:

* * *

(2) For an employer, because of race, color, creed, religion, national origin, or sex,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes an applicant for employment; or

(b) to discharge an employee;

(c) to discriminate against an employee with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment;

* * *

(4) For an employer, employment agency, or labor organization, before an individual is employed by an employer or admitted to membership in a labor organization, to

(a) require the applicant to furnish information that pertains to the applicant's race, color, creed, religion or national origin, unless, for the purpose of national security, information pertaining to the national origin of the applicant is required by the United States, this state or a political subdivision or agency of the United States or this state, or for the purpose of compliance with the public contracts act information pertaining to the race, color, creed, religion or national origin of the applicant is required by the United States or a political subdivision or agency of the United States; or

(b) cause to be printed or published a notice or advertisement that relates to employment or membership and discloses a preference, limitation, specification, or discrimination based on race, color, creed, religion, national origin, or sex.

* * *"

APPENDIX B

Minneapolis Code of Ordinances

"945.030. *Violations.*

(a) *Act of Discrimination.* Without limitation the following are declared to be discrimination:

(1) For an employer, because of race, color, creed, religion, ancestry, national origin, or sex to fail or refuse to hire; to discharge an employee; or to accord adverse, unlawful or unequal treatment to any person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, discharge, or any term or condition of employment except when based on a bona fide occupational qualification. * * *"

SUPREME COURT, U. S.

In the
Supreme Court of the United States

October Term, 1971

No. 71-1265

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, et al.

Petitioners

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Constitutional and Statutory Provisions	2
Statement of the Case	3
Argument	5
I. The Record Below Provides No Basis In Fact For Assumptions Which Underlie the Questions Petitioners Seek to be Reviewed by This Court	5
II. The Decision of the Court of Appeals is not in Conflict with Other Decisions of the Courts of Appeals or with Other Decisions of This Court	9
III. The Alternating Preference Imposed by the Court of Appeals Does Not Conflict With the Equal Protection Clause or with 42 U.S.C. §1981	11
Conclusion	13

APPENDIX INDEX

Preliminary Injunction and Order dated November 5, 1970 ..... A-1

Findings of Fact and Conclusions of Law dated March 9, 1971 ..... A-4

Resolution of Minneapolis City Council of February 25, 1972 ..... A-47

Resolution of Minneapolis City Council of March 10, 1972 ..... A-49

TABLE OF AUTHORITIES

Cases:

Contractors Ass'n of Eastern Pennsylvania v. Schultz, 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U. S. 854 (1971) 10
Griggs v. Duke Power Co., 401 U.S. 424 (1971) .10, 11
Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969) 9
Louisiana v. United States, 380 U.S. 145 (1965) 11
Norwalk CORE v. Norwalk Development Agency, 395 F.2d 920 (2nd Cir. 1968) 10
Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 549 (1947) 5
State ex rel. Kangas v. McDonald, 188 Minn. 156, 246 N.W. 900 (1933) 8
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 12
United States v. Local 38, Electrical Workers, 428 F. 2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970) 10
United States v. Local 86, Ironworkers, 315 F. Supp. 1202 (W. D. Wash. 1970), aff'd, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971) ... 9
Vogler v. McCarty, 451 F.2d 1236 (5th Cir. 1971) .. 9

Constitutional and Statutory Provisions:

United States Const., Amend. 14, §1 2
42 U.S.C. §1981 2
Title VII of Civil Rights Act of 1964 9

Other Authorities:

EEOC Testing Guidelines, 29 C.F.R. §1607.4(a) ... 7

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the panel of the Court of Appeals dated September 9, 1971 and of that Court en banc dated January 7, 1972 are reported at 452 F.2d 315 and are set forth in the Appendix to the Petition. The decree rendered by the District Court on March 9, 1972 is incorporated in the panel decision of the Court of Appeals. The Findings of Fact and Conclusions of Law entered by the District Court on that same day are not officially reported but may be found at 3 CCH EPD ¶8205 and 3 BNA FEP Cases

692. These Findings of Fact and Conclusions of Law are fully set forth in Respondents' Appendix to this Brief. The Respondents' Appendix also contains the Preliminary Injunction and Order of the District Court dated November 5, 1970 which declared this action to be a class action and enjoined hiring of fire fighters pending a hearing on the merits, as well as certain recent resolutions of the Minneapolis City Council with respect to this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, Section 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalities, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

In this action the plaintiffs, on behalf of the class of persons similarly situated, sought relief from discriminatory hiring practices in the Minneapolis Fire Department. Shortly after the filing of the action, the Minneapolis Commission on Human Relations, which is charged by law with the purpose of carrying forward the policies of the City of Minneapolis in the field of human relations, was allowed to intervene as a party plaintiff. At the time this action was commenced there were about 535 men in the Minneapolis Fire Department. (Ex. 93, Deposition of Fire Chief Hall, p. 48).* There were no Blacks, American Indians or Spanish-surnamed Americans. (R. 154-56). The last minority employee hired was a Black man hired in 1944, who was dismissed shortly thereafter. (R. 157-60). In light of the ever-increasing minority population in Minneapolis and in light of the fact that over five percent of the entire work force of the City of Minneapolis was non-white in 1970 (Exs. 48-49), the District Court concluded that the statistical evidence presented a prima facie case of racial discrimination. (Resp. App. A-10).

The District Court made further detailed findings regarding various hiring practices which had the effect of eliminating minority persons from employment as fire fighters. (Resp. App. A-10 to A-26). In short, the District Court found that these practices together with the established

*The printed record in the Court of Appeals which has been certified to this Court does not contain the exhibits received in evidence by the Court, including two depositions. That record likewise eliminates certain detailed tables from the Stipulation of the parties.

In this Brief, references will be made to Petitioners' Appendix (Pet. App.), Respondents' Appendix (Resp. App.), the printed record (R.), or the particular exhibit involved.

bad reputation of the Minneapolis Fire Department for fair hiring practices had created and perpetuated an all-white department. (Resp. App. A-5, A-28). A challenge to the sufficiency of these findings was rejected in the Court of Appeals. (Pet. App. A-13).

For relief, the District Court ordered certain changes in qualification procedures, most of which were affirmed in the Court of Appeals and none of which are placed in issue in the Petition to this Court. The District Court also ordered that an absolute preference should be given in employment to the top twenty minority applicants who meet established qualifications. (Pet. App. A-4 to A-6). This order was based on findings that even if discriminatory hiring practices were eliminated only one or two minority persons would likely be hired, and that the hiring of this token number of minority persons would not overcome the effects of past discrimination and would not dispel the continuing effects of the Department's bad reputation for fair employment practices with respect to minority persons. (Resp. App. A-41 to 42). As the District Court found, "What is needed now to correct the effects of the past twenty-five years is the immediate certification of at least twenty minority fire fighters." (Resp. App. A-42).

The panel decision of the Eighth Circuit rejected the absolute preference. A timely petition for rehearing was submitted by the Respondents herein and supported by Amicus Curiae Briefs by the United States and the NAACP. After granting rehearing en banc, the Court of Appeals modified the District Court's order to provide a limited minority preference involving the alternative hiring of one minority person and two non-minority persons until such time as a total of twenty of the next sixty fire fighters hired were minority persons.

ARGUMENT

I.

THE RECORD BELOW PROVIDES NO BASIS IN FACT FOR ASSUMPTIONS WHICH UNDERLIE THE QUESTIONS PETITIONERS SEEK TO BE REVIEWED BY THIS COURT.

Throughout their Petition, the two original defendants who seek review in this Court contend that the order of the District Court as modified by the Court of Appeals requires impermissible racial discrimination in favor of minority applicants over equally or more qualified white applicants. Even if this statement were supported by the record below, the Respondents contend that a minority preference which will not involve hiring of unqualified persons is constitutionally permissible when it is found necessary to eliminate the effects of past discrimination. The District Court found that apart from some alteration of the hiring order for qualified minority applicants, the effects of at least twenty-five years of discriminatory practices would continue. (Resp. App. A-42). The record below, however, does not support the underlying assumption in the questions presented for review that the challenged hiring procedure will in fact favor minority applicants over equally or more qualified white applicants. Because that issue is based on speculation and not fact, this Court is not presented with the requisite record for deciding the Constitutional issue presented in the Petition. Cf. *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549 (1947).

The questions Petitioners present to this Court assume that the examination to be used in selecting fire fighters

will rate each of two hundred or more qualified fire fighter applicants in order of his relative likelihood of success on the job. (Almost five hundred persons applied for the fire fighter position in the summer of 1970. (R. 36). If, as in the past (R. 41), only one-half of those persons qualify, the pool of eligible applicants will number well over two hundred.) If the record provided a factual basis for this assumption, then the issue might properly be placed before this Court. On the contrary, however, the record does not support the assumption that over two hundred qualified persons will be ranked in order of their relative merit. What the record does demonstrate is the difficulty of providing a statistically significant basis even for separating qualified from unqualified applicants. (R. 79-83).

The assumption which the Petitioners make must be viewed in light of the actual circumstances in which the hiring order required by the Court of Appeals will be applied. Apart from the operation of the veterans preference, selection of fire fighters is made from eligibility lists which rank applicants in order of their examination scores. These scores differ by hundreths of a point. For instance, in 1964 there was a difference of 3.20 points between the final scores of the sixth and thirtieth persons on the list. (R. 50; Stip. ¶53. The printed record does not include names, rankings, and scores). Nevertheless, petitioners suggest that these minute variations in test scores establish applicants' relative qualifications for the purpose of litigating a constitutional issue. The Court of Appeals en banc termed such an assumption "speculative" and questioned whether the qualifying test would in fact rank "qualified applicants with precision, statistical validity, and predictive significance." (Pet. App. A-32).

Validation efforts required before use of new examinations (Pet. App. A-7) will not remedy this uncertainty. The difficulty in general of obtaining statistically significant predictions of future job performance has already been mentioned. With respect to minority applicants, these validation efforts are even more suspect. Under the EEOC Guidelines on Employment Testing Procedures, "a test should be validated for each minority group with which it is used." 29 *C.F.R.* §1607.4(a). The validation of the new fire fighter examinations must initially be conducted by comparing job performance ratings of present fire fighters, all of whom are white, with their scores on the examination to be given minority and non-minority applicants. The predictive value of test scores of minority persons will not really be known until some of the minority applicants have been hired and their subsequent work performance evaluated. Under these circumstances, it is speculative to assert that the minority preference will actually result in the hiring of "less qualified" minority applicants.*

The very hiring practices followed for years by the City of Minneapolis contradict the assertion made in the question presented to this Court. The record establishes that strict adherence to examination scores has never been found necessary to fulfill the "paramount interest" of the City in "promoting the efficiency of its Fire Department by having it composed of the best qualified individuals." Petition, p. 14. From among the pool of qualified applicants

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*It is possible that the challenged preference may never be implemented. The order entered on remand in the District Court on April 5, 1972 provides that regular hiring practices are to be followed if one-third of the persons hired at any particular time are minority persons. Only if the regular hiring order does not satisfy the one for two ratio will the preference be implemented.

examination scores are disregarded to assure hiring of veterans and Minneapolis residents. (R. 37-40; Exs. 56-57). The record in this action provides a graphic example of the application of the veterans preference. A total of thirty-four fire fighters with the Minneapolis Fire Department as of July 10, 1970 were hired as a result of examinations given in 1961. Over a period of fifteen months, twenty-three veterans were hired whose scores ranked from 13 through 152 on the eligibility list. Twenty-two months after the first veterans were hired, a group of eleven persons were hired, including ten non-veterans whose rankings on the eligibility list ranged from 9 through 28. (R. 50, Stip. ¶¶55-58. The names, scores, and rankings are not included in printed record). It follows that the City recognizes by its own practice that the relative examination scores of qualified applicants provide no firm basis for determining the relative qualifications of these persons.

The Minnesota Supreme Court has held that modification of the hiring order of qualified applicants is constitutionally permissible because all applicants, veterans and non-veterans, must establish their qualifications for a job on the basis of the same standards. See *State ex rel. Kangas v. McDonald*, 188 Minn. 156, 161, 246 N.W. 900 (1933). No different procedure is contemplated by the challenged decision of the Court of Appeals. Indeed, that decision, because of its limited effect, will have far less effect than the deviations from hiring in order of relative examination scores which are routinely followed.

The suggestion that the minority hiring procedure required by the Court of Appeals to remedy the effects of past discrimination will require the hiring of less qualified minority applicants is speculative and without support in

the record in this case. Furthermore, that very assumption is contradicted by years of similar practice in selecting fire fighters. For these reasons alone, the petition for a writ of certiorari should be denied.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH OTHER DECISIONS OF THE COURTS OF APPEALS OR WITH OTHER DECISIONS OF THIS COURT.

The decision of the Eighth Circuit stands for the proposition that affirmative hiring remedies for minority persons as a class, including remedies such as alternative hiring of qualified minority and non-minority persons who have not been specific targets of past discriminatory practices, are a permissible means of overcoming the present and continuing effect of past discriminatory employment practices. That decision is consistent with decisions by other Courts of Appeals in related cases.

The Fifth Circuit upheld a one-for-one hiring preference in *Local 53, Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). See also *Vogler v. McCarty*, 451 F. 2d 1236 (5th Cir. 1971). In *United States v. Local 86 Ironworkers*, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971), the Ninth Circuit affirmed in all respects a District Court order which required a thirty percent participation by Blacks in an apprenticeship program, see 315 F. Supp. at 1247, in addition to providing differing standards for Blacks on initiation fees, examination and experience requirements, and referral procedures, 315 F. Supp. at 1237-45. In another Title VII case, the Sixth Circuit held that the anti-preference provisions of Title

VII could not be read as a ban on affirmative relief against the continuing effects of past discrimination. *United States v. Local 38, Electrical Workers,* 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970).*

The principle underlying the challenged ruling of the Eighth Circuit is also consistent with the approval of analogous percentage goals for minority workers in the "Philadelphia Plan" adopted pursuant to Executive Order 11246 and upheld by the Third Circuit over objections that it might violate the rights of white workers under the Due Process Clause of the Fifth Amendment and Title VII of the Civil Rights Act of 1964. *Contractors Ass'n of Eastern Pennsylvania v. Schultz,* 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971). The rationale of the Eighth Circuit decision is likewise consistent with the position of the Second Circuit in *Norwalk CORE v. Norwalk Development Agency,* 395 F.2d 920, 931-32 (2nd Cir. 1968) that a classification by race is permitted for the purpose of achieving equality and is required if necessary to prevent unequal treatment.

The petitioners suggest that the decision of the court below is inconsistent with statements of this Court in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). See Petition, pp. 8, 10. The Eighth Circuit decision, however, is not in conflict with *Griggs. Griggs* dealt with the legality of certain education and testing requirements. The passages quoted establish that it is not a violation of Title VII to refuse to hire a demonstrably unqualified minority applicant.

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*While these cases arise under Title VII, the instant case arising under 42 *U.S.C.* §1981 presents the same essential questions of a possible conflict between general prohibitions against discrimination and specific requirements for affirmative relief in an action brought to remedy past discrimination.

They cannot be read to decide an issue not presented to the Court in *Griggs*—whether a classification by race which does not require the hiring of unqualified persons may be imposed if found necessary to the elimination of continuing effects of past discrimination.

III.

THE ALTERNATIVE PREFERENCE IMPOSED BY THE COURT OF APPEALS DOES NOT CONFLICT WITH THE EQUAL PROTECTION CLAUSE OR WITH 42 U.S.C. §1981.

Throughout their Petition, the two defendants who seek review in this Court assert that the decision below involves impermissible racial discrimination in favor of minority applicants. The argument above points out that the record in this case does not provide a factual basis for their contentions. What the record does show is that in order to remedy the continuing effects of past discrimination it was necessary to assure the hiring of a limited number of minority applicants who establish their qualifications for the fire fighter position. Upon making a finding of past and continuing discrimination, a federal court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Faced with the record in this case and that mandate from this Court, the Court of Appeals had no alternative but to require a form of relief which would eliminate the effects of

past discrimination. Cf., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).*

The District Court made crucial findings of fact based upon a detailed analysis of the past discriminatory qualifications for fire fighters in Minneapolis and the probable effect of the changes ordered. The District Court found that even with new hiring procedures the probabilities were that a small number—one or two—minority persons would be added to the Minneapolis Fire Department. The District Court further found that the addition of such a small number of minority persons would not dispel the continuing effects of past discrimination. Finally, that Court found that the past history of racial discrimination was such that the effects of the Department's bad reputation for hiring minority persons would continue unless at least twenty minority persons were hired. (Resp. App. A-42). These findings served as a basis for the opinion in the en banc decision. (Pet. App. A-32). They are not challenged here. In short, the record in this case supports the finding that the assurance of hiring of a relatively large group of minority applicants was necessary to the effective integration of the Minneapolis Fire Department.

Such an order may have the effect of giving a minority

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*The Petitioners suggest that *Swann*, a school desegragation case, is not applicable to the present employment action. Petition, p. 11. But *Swann* stands for the proposition that federal district courts have broad equitable power to create an effective remedy for past discrimination. It is the latest in a series of decisions which require that effective means be used now to eliminate segregated schools. In the present case the District Court found that other relief would not effectively remedy continuing discrimination, and that the assurance of hiring at least twenty minority firefighters was the only way to eliminate the effects of the past. *Swann* certainly supports implementation of such necessary and effective affirmative relief.

applicant a job which would otherwise go to a white applicant. But, as we have seen, preference in the order of hiring for employees of the City is the established means to assure employment for certain groups of qualified applicants. Given the necessity of framing appropriate relief where discrimination has been clearly established, the decision of the Court of Appeals to grant a minority preference for a limited time, for a limited number of persons, and in a manner calculated to have the least possible effect on white applicants is a sound and, all things considered, rather modest solution. The relief granted is calculated to eliminate discrimination on the basis of race and thus implement the essence of the Equal Protection Clause and the various Civil Rights Acts which have followed. The decision of the Court of Appeals does not raise questions which require review by this Court.

CONCLUSION

In light of the record in this case, the petitioners do not present questions of broad constitutional policy which this Court should feel compelled to review. The decision below is consistent with prior decisions in other circuits and with the principles upon which the Department of Justice relies as a basis for its enforcement of Title VII. That decision was not challenged by Commissioner Glover in the Court of Appeals, and is not challenged by his successor in office in this Court. The other original defendants or their successors in office (including the present Chief of the Fire Department) have not joined in the Petition. Furthermore, the City Council of Minneapolis by a substantial majority, has passed a resolution stating that it is not in the best interest of the City for the Civil Service Commissioners to

petition for certiorari and also directed that an Amicus Curiae brief be filed in this Court opposing such review. (Resp. App. A-47 to A-50). Apparently these persons and the City Council have determined that it is now time to end this litigation and proceed with the implementation of the order of the Court of Appeals. In such circumstances, the relief granted should not be disturbed by this Court.

Therefore, the respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

United States District Court
District of Minnesota
Fourth Division

4-70 Civ. 399

Gerald Carter, Willie Harris, Herbert Hill III, Benjamin E. McHie, and Ward K. Mitchell, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

and

Minneapolis Commission on Human Relations,

Plaintiff-Intervenor,

vs.

Hugh Gallagher, Gleason Glover and Ward Canfield, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis,

and

John Proctor, individually and as Personnel Director of the Civil Service Commission of the City of Minneapolis,

and

Kenneth Hall, individually and as Chief of the Fire Department of the City of Minneapolis,

Defendants.

Preliminary Injunction and Order

The plaintiffs herein have moved this Court for a preliminary injunction enjoining the defendants from giving the

proposed fire fighter examinations pending the completion of discovery in this matter and from filling any fire fighter positions on a permanent basis for the same time. The plaintiffs also moved this Court for an order permitting this action to proceed as a class action.

On the basis of the motions, affidavits and memoranda submitted to the Court, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

1. The Minneapolis Fire Department has 544 employees, none of whom are Black or Indian.

2. That since World War II there have been no Blacks and no Indians employed as fire fighters with the Minneapolis Fire Department.

3. That Civil Service examinations for the positions of fire fighter are scheduled for the week of November 16, 1970.

4. That there are 495 applicants for that position, at least twenty-five of whom are members of minority groups.

5. That the plaintiffs, on the basis of the statistical evidence presented to the Court, have established a prima facie case of racial discrimination in hiring for the Minneapolis Fire Department.

6. That the plaintiffs and the class of persons whom they represent will suffer irreparable harm if the relief requested in their motion for a preliminary injunction is not granted.

7. That the plaintiffs properly represent the following classes of persons:

a. All those Black, Indian and other minority persons presently applying for employment with the Minneapolis Fire Department.

b. All those Black, Indian and other minority persons in the City of Minneapolis who are not applicants for employment with the Minneapolis Fire Department either because their applications were not approved or because they believed that equal employment opportunity is denied to Black, Indian and other minority applicants for such employment.

c. All those persons who would qualify as a veteran pursuant to Minnesota Statute 197.45 in seeking to claim a veterans' preference pursuant to said section but for the state and local durational residency requirements imposed therein.

8. That the Plaintiffs have no other adequate remedy at law.

Therefore, IT IS ORDERED, that:

1. The plaintiffs herein are permitted to proceed with this action as a class action.

2. That the defendants herein, their successors in office, agents, and employees, and all other persons in active concert or participation with them, are enjoined from conducting any civil service examinations, including written, agility, medical and psychological examinations, for the position of fire fighter with the Minneapolis Fire Department, until such time as the plaintiffs herein, including the intervening plaintiff, have had a reasonable time to complete such discovery as is reasonably necessary to permit them to prepare for a hearing on their requests for declaratory and

injunctive relief, and until these requests have been heard and determined by the Court.

3. For the same period of time referred to in the preceding paragraph, the defendants herein, their successors in office, agents, and employees, and all persons in active concert or participation with them, are enjoined from filling any fire fighter positions presently available in the Minneapolis Fire Department, and expected to be filled pursuant to the present examinations for employment as a fire fighter with the Minneapolis Fire Department, or any such positions that become available during the pendency of this order, provided that temporary appointments may be made which in no way provide that such temporary appointees have any right to continue in such positions after the fire fighter examinations are given and an eligibility list is established for such positions pursuant to further order of the Court.

4. That any party may make application to the Court for an order terminating the time within which discovery must be completed.

5. That the requirement for a bond is waived.

Dated: November 5, 1970. 4:45 o'clock p.m.

/s/ EARL R. LARSON,
United States District Judge.

[Copies may be served on defendants.]

Findings of Fact and Conclusions of Law

1. In this action, the plaintiffs alleged that past discriminatory hiring practices had created an all-white fire

department in Minneapolis, and that the present hiring practices for the position of fire fighter with that department do not overcome the continuing effects of past discrimination. The Court, in accordance with these findings, concludes that the present all-white Minneapolis Fire Department is the result of a pattern and practice of discrimination and that recent changes made in hiring practices do not overcome the continuing effect of that past discrimination.

2. This action was initiated late in September, 1970. On November 5, 1970, a preliminary injunction was issued which enjoined giving of fire fighter examinations then scheduled for November 16, 1970, and which enjoined permanent hiring of fire fighters until the plaintiffs' complaint had been heard and decided on the merits.

3. Testimony was heard by the Court on March 1 and 2, 1971 on the present motion for injunctive relief. The parties also submitted a statement of stipulated facts and stipulated to the admissibility of numerous exhibits.

4. The plaintiff Gerald Carter is a 29-year-old Black resident of the City of Minneapolis. He applied for a fire fighter job with the Minneapolis Fire Department during the summer of 1970.

5. The plaintiff Ward Mitchell is a 23-year-old Black resident of the City of Minneapolis. He applied for the position of fire fighter with the Minneapolis Fire Department during the summer of 1970.

6. The plaintiff, Benjamin McHie, is a 22-year-old Black resident of the City of Minneapolis. He was contacted during the summer of 1970 by representatives of

MOER, the local anti-poverty agency, regarding the possibility of applying for the fire fighter position. He refused to apply, because he felt that his chances of becoming a fire fighter were very slim, especially since there were no Black fire fighters.

7. Plaintiffs Carter and Mitchell represent the class of all minority (Black, Indian-American and Spanish-surnamed American) applicants for the position of fire fighter with the Minneapolis Fire Department.

8. Plaintiff McHie represents a class of minority persons who felt that there was insufficient opportunity for a minority person to become a fire fighter and therefore refused or neglected to seek such employment.

9. The plaintiff Herbert Hill III was, at the time this action was commenced and at the time of the hearing on the motion for a preliminary injunction, a Black resident of Minneapolis who had moved to this city after completing military service early in 1970. He had attempted to apply for the fire fighter position by submitting an application to unknown persons at the South Side Community Center. This application was never received by the Minneapolis Civil Service Commission. His present whereabouts are not known.

10. The plaintiff Willie Harris was, at the time this action commenced and at the time of the hearing on the motion for preliminary injunction, a Black resident of Minneapolis who had moved to this City after completing military service early in 1970. He had attempted to apply for the fire fighter position by submitting an application to unknown persons at the South Side Community Center. This application was never received by the Minneapolis Civil

Service Commission. His present whereabouts are not known.

11. The plaintiffs Harris and Hill represent a class of persons who seek civil service employment in Minneapolis and who are veterans, but who are unable to qualify for a veterans preference pursuant to M.S.A. §197.45 because they have not lived in the State of Minnesota and in the City of Minneapolis for a period of five years.

12. The intervening plaintiff, the Minneapolis Commission on Human Relations, is a legally constituted commission of the City of Minneapolis, the chief duty of which is implementing the policies of the City of Minneapolis in the field of human relations and of protecting and promoting the civil rights of the citizens of the City of Minneapolis.

13. The defendants Hugh Gallagher, Ward Canfield, and Gleason Glover are the Commissioners of the Civil Service Commission of the City of Minneapolis. In that capacity, they are responsible for recruiting, testing and certifying all applicants for employment in the classified service in the City of Minneapolis, including all members of the Minneapolis Fire Department.

14. The defendant, John Proctor, was, at the time this lawsuit was initiated, the Personnel Director of the Personnel Department of the Civil Service Commission of the City of Minneapolis. In that capacity, he was responsible to the Commissioners for the recruitment, testing, and certification of all applicants for employment in the classified service in the City of Minneapolis, including all members of the Minneapolis Fire Department.

15. The defendant Elisabeth A. M. White is the supervisor of Personnel Selection in the Personnel Department of the Minneapolis Civil Service Commission. In that capacity she has the immediate responsibility for direct supervision of those Civil Service employees who recruit, examine and certify applicants for employment in the classified service of the City of Minneapolis, including all members of the Minneapolis Fire Department. During the past year, she has exercised close supervision over the recruitment of applicants for fire fighter, the development of the examination plan for that position, and the development of the written examination to be used for fire fighter applicants.

16. The defendant Kenneth W. Hall is the chief of the Minneapolis Fire Department. He has held that position since 1962. In his position, he has the ultimate responsibility for all phases of the operation of the Minneapolis Fire Department.

17. The defendants in this case, in their respective official capacities, are acting under color of law.

18. The Minneapolis Fire Department at the present time has about 535 members. Those members of the fire department are classified as fire fighters (the entry level position), fire motor operators (the truck or engine driver), fire captains (the person in charge of a truck or engine company), district chiefs (the person in charge of one of the five fire districts in the city), deputy chiefs, the assistant chief, and the chief of the department. There are other specialized positions in the fire department, such as fire marshal or the director of the fire school, but the aforementioned positions constitute the active fire fighting force. All promotions in the fire department are from within;

it is not possible to begin employment with the fire department other than at the fire fighter level. (Exhibits 36-39; Hall Deposition, 6, 48; White Deposition, 102).

19. There are at present no Blacks, Indian-Americans, or Mexican-Americans employed with the Minneapolis Fire Department. (Exhibits 48-49; Hall Deposition, 41).

20. The last Black man hired as a fire fighter with the Minneapolis Fire Department was so hired in 1944. He was dismissed after four months' employment, for alleged violations of the uniform requirement. His abrupt dismissal occurred in circumstances which suggest that he may have been dismissed because of his race. (Hall Deposition, 42; Exhibits 88-91).

21. One Black man was employed with the fire department up until 1962, when he retired as a district chief. This man was relatively light complected. Chief Hall said of him: "I personally—he's a good friend of mine, I call him a Negro. I don't know whether he would admit to it, but I can personally say he is a Negro." (Hall Deposition, 42).

22. The United States Census Bureau Reports for the year 1970 indicate that Minneapolis had a population in that year of 434,400 persons, of which 19,005 or 4.37% were Black and a total of 27,986 persons or 6.44% were non-white (including Blacks). (Stipulation, ¶ 65, Table III).

23. In 1960, the non-white population of Minneapolis was 15.594 or 3.23%. (Stipulation, ¶65, Table III).

24. A minority employee census taken in July of 1970 revealed that 5.29% of all persons employed by the City of Minneapolis are non-white. (Exhibits 48-49).

25. There is now and has been for the past twenty-five years a gross disparity between the percentage of non-white persons in Minneapolis and the percentage of non-white persons employed with the Minneapolis Fire Department.

26. There is now and was in 1965 a gross disparity between the percentage of non-white persons employed by the City of Minneapolis as a whole and the percentage of non-white employees in the Minneapolis Fire Department. Since there has never been more than one minority fireman with the Minneapolis Fire Department in the last 25 years, the very same disparity revealed by the minority employee censuses taken in 1965 and 1970 would have existed in earlier years. (Exhibits 47-49)

27. The statistical data referred to in the preceding paragraph is prima facie support for the inference that racial discrimination has been practiced in the hiring of fire fighters over the last twenty-five years.

28. No evidence has been presented to the Court which rebuts the inference of racial discrimination based upon statistics alone. On the contrary, the facts stipulated by the parties, the exhibits in evidence, and the testimony in open court establish that the present all-white fire department is the result of hiring practices and procedures which, whether by design or not, discriminated against minority applicants as is further described below.

29. Written examinations have been used as a part of all civil service fire fighter examinations. These examinations have been of considerable difficulty. Over a twenty-year period from 1948 through 1968, a total of 2,404 persons took the written examinations. Only 1,308 of these

persons attained a passing score of 70.0%, or 54.41% of the total. The percentage of persons passing the examination varied from a low of 40% in 1968 (examination number 7737) to a high of 64.67% in 1952 (examination number 4523). During that period, a total of 22 identifiable minority persons took the fire fighter examinations. Six of these persons passed, or 27.27%. While the group is not large, and there may have been more minority group applicants who took the test but cannot now be identified, these scores indicate that minority group applicants did substantially less well on the examinations given. (Stipulation ¶¶ 20-21.)

30. It is now generally recognized that minority group persons will often score lower than white persons on an examination which utilizes a formal English vocabulary. Likewise, an examination which utilizes the street language of Blacks would discriminate against white applicants. An employment test which is thus "culturally biased" against any group will tend to eliminate persons of that group without necessarily establishing that they are not likely to succeed in the employment sought.

31. The four past fire fighter examinations (Exhibits 32-35), given in the years 1957 through 1968, are all representative of the type of written examination which can have a discriminatory effect against minority persons. These examinations utilize a formal English vocabulary and assumed a background in fire fighting practices and procedures. It is highly probable that they were in fact culturally biased against minority applicants, and thus served not only to eliminate minority applicants but also to deter minority applicants from applying.

32. No effort was ever made prior to the current examination period to analyze the fire fighter examinations to determine whether they were culturally biased or whether they were valid predictive instruments for use in selecting fire fighters. (White Deposition, 78).

33. The four past fire fighter examinations (Exhibits 32-35) were used again and again in substantially the same form. (Stipulation ¶¶ 18-19; White Deposition, 75-78).

34. There was no proven and compelling employment selection purpose served by the use of these four examinations. Indeed, since fire fighter employment entails an eight-week training course, with on-the-job training, and continuous retraining thereafter, this type of general achievement examination was not an adequate selection device to determine which applicants could learn the fire fighter duties and responsibilities and perform capably on the job.

35. By the very routine involved in civil service examining, the Civil Service Commission staff was on notice that few of the past applicants were Black. The continued use of these examinations may not have been done with the conscious intent to discriminate, but nevertheless, a discriminatory result ensued. (White Deposition, 75-80).

36. From the years 1950 through 1968 (examination number 7492) the announcement for the fire fighter position (which is actually the examination plan approved by the Civil Service Commission stating the official qualifications for the job) contained the statement that the applicant must list all offenses for which he had been arrested. These announcements stated that all applications are checked with the Police Department. The following statement also appeared:

> Your application will not necessarily be rejected because of any past arrest, except for a felony, but if there is any falsification of your record in your sworn application, your application will be rejected. (Exhibits 3-10).

These same announcements stated that an applicant will be rejected for conviction of a felony and may be rejected for conviction of any crime. (Exhibits 3-10; Stipulation ¶31).

37. In fact, an applicant was not rejected on the basis of an arrest record, but only on the basis of a conviction record. To this extent the statement quoted in paragraph 36 was misleading. (White Deposition; 25).

38. Although the Commission staff apparently has always read "arrest record" to mean "conviction record" the confusion between the terms "arrest" and "conviction" was evident in the testimony to two of the present Civil Service Commissioners.

39. The announcements for the fire fighter examination in the years 1950 through 1961 stated that an applicant will be required to report for fingerprinting and will be rejected for refusal to be fingerprinted. (Exhibits 6-10; Stipulation ¶ 32).

40. The announcements for the fire fighter examinations from 1964 through 1968 (examination number 7492) stated that an applicant may be required to report for fingerprinting and will be rejected for refusal to be fingerprinted. (Exhibits 3-5; Stipulation ¶ 33).

41. For the second examination given in 1968 (number 7737), the announcement contained the following statement:

Arrest record: Must be satisfactory. (No felonies or serious crimes.)

That same announcement contained the same statement quoted in paragraph 36 above, requiring that all arrests be listed. (Exhibit 2; Stipulation ¶ 34).

42. The statement with reference to arrests in the past fire fighter announcements, even if it was not really enforced, would discourage persons with an arrest record from applying for the fire fighter position.

43. In the years from 1945 through 1969, the Annual Reports of the Minneapolis Police Department reveal that arrests made of non-white persons constitute a percentage of all arrests made which increases from 9.22% in 1945 to 13.37% in 1950 to 20.53% in 1960 to 26.94% in 1969. United States Census Reports indicate that the percentage of non-white persons in Minneapolis increased from 1.07% in 1940 to 1.62% in 1950 to 3.23% in 1960 to 6.44% in 1970. Comparison of the census data with the arrest data reveals that there is and has been a substantial and significant disparity between the percentage of non-white persons in the city and the percentage of non-white persons arrested. (Exhibits 81, 85; Stipulation ¶ 36, ¶ 65, Table III).

44. Since the percentage of arrests was substantially higher for non-white persons in Minneapolis, the purported arrest record qualification would have had a decided discriminatory effect in discouraging non-white persons from applying for the fire fighter position.

45. This discriminatory effect can in no way be justified; for the Commission itself did not claim to use arrest

records as a fire fighter qualification. Further more, an arrest record, per se, is not proof of any criminal act, and bears no rational relation to ability adequately to perform as a fire fighter.

46. The announcements (examination plans) for fire fighter from 1950 through 1968 contained a requirement that a conviction for a felony was an absolute bar to employment as a fire fighter. No distinction was made between types of felonies. The number of years between the conviction and the date of application was not considered. Furthermore, the applicant could be disqualified for any convictions, including misdemeanors, although the manner in which this disqualification was implemented was not spelled out in detail. (Exhibits 2-10; White Deposition, 24-25; Stipulation ¶ 31).

47. Like arrests, convictions of felonies have also involved a percentage of non-white persons which is substantially in excess of their percentage in the population.

48. In 1969, on the basis of referrals made to the Hennepin County Department of Court Services, it appears that 12.19% of the male convicted felons so referred were Black, that 3.56% of such persons were Indians, and that a total of 16.44% of such persons were non-whites. (Stipulation ¶ 37-38).

49. The 1970 Census Reports show that 9,345 of the 198,845 males in Minneapolis are Black, or 4.70%. On a countywide basis, for the Court Services data would reflect Hennepin County as a whole, the percentage would be even lower. (Exhibit 85; Stipulation ¶ 65, Table IV).

50. The Reports of the Minnesota Bureau of Criminal

Apprehension for the years from 1964 to 1970 indicate that the percentage of non-whites convicted in all Minnesota district courts has been substantially higher than the percentage of non-whites in the population as a whole. Since over half of the Blacks in Minnesota live in Minneapolis, it is reasonable to infer that the disparity revealed by the 1969 Court Services data has existed for previous years as well. While no data has been submitted to the Court for convictions by race in years prior to 1964, the available Minneapolis Police Department arrest statistics strongly suggests that the present percentages of non-white convictions would have prevailed in earlier years as well. (Exhibits 81-85; Stipulation ¶¶ 37-44, 65, Tables II, V, VI.)

51. The conviction record requirement as stated in these fire fighter examination plans, especially the absolute bar for the conviction of any felony, would necessarily have the effect of deterring persons with a record of convictions from applying for the position of fire fighter. Although out-of-state convictions were not ordinarily considered (White Deposition, 18), the references to fingerprinting and the strong statement regarding the need to state all convictions (Stipulation ¶¶ 31-34) would have the effect of deterring anyone who had a felony conviction anywhere from applying. It is evident from the Hennepin County and Minnesota felony conviction statistics that this conviction record requirement would be a qualification which would deter more non-whites than whites, on a proportionate basis. The relatively small number of Black applicants in the years 1948 through 1968 can be explained, at least in part, by the absolute bar imposed on persons convicted by a felony and by these other strongly stated requirements.

52. No compelling employment purpose was served by the absolute felony bar to employment as a fire fighter, especially since no distinction was made between types of crimes, no consideration was given to the length of time which elapsed between the conviction and the application, and no effort was made to determine what convictions reasonably can be said to constitute a bar to employment as a fire fighter. For the 1970 examination plan, a sliding point scale was adopted which distinguished between convictions on the basis of length of time between the date of conviction and the date of application. (Exhibit 67). That sliding point scale is now in the process of further revision. But there is no evidence which suggests that there is any rational basis for an absolute felony bar, such as was applied up through 1968, as a qualification for the fire fighter position.

53. Within the past year, increased efforts have been made to obtain a substantial number of minority applicants for the fire fighter position. At least twenty-six of the total of 494 applicants were minority persons. In the previous 22 years, there were only 24 identifiable minority (Black) applicants. To a significant extent, this small number reflects recuitment efforts which were not directed in any way at obtaining minority applicants. (Stipulation ¶¶ 8, 29-30).

54. There are three newspapers in Minneapolis, the Minneapolis Spokesman, the Twin City Observer, and the Twin City Courier, which reach a large portion of the minority community. Until 1965, there was no advertising of the availability of fire fighter positions in these newspapers. These papers were used in the 1970 recruitment program

(Exhibit 62) but prior to that time there was little use made of them. One fire fighter advertisement appeared in the Spokesman on August 3, 1967 (Exhibit 97), but this was after applications closed for the fire fighter positions then open on July 31, 1967 (Exhibit 4). There was testimony to the effect that the Observer and the Courier were used between 1965 and 1970 (White Deposition, 72-74), but the defendants, who have records of such advertising, did not present any evidence regarding when these advertisements appeared. The Civil Service Commission did advertise other positions in the Spokesman during that time, including patrolman and civil rights department director. (Exhibits 97, 101). The 1970 minority employee census for Minneapolis indicates that minority employment efforts in the Police Department were more successful. (Exhibit 48-49).

55. Prior to 1965, recruiting of fire fighters involved advertising in the two major daily newspapers in Minneapolis, advertising in the official legal newspaper, Finance and Commerce, and posting of announcements in the City Hall and the fire stations. No affirmative recruitment efforts comparable to those made in 1970 were made in any previous recruitment period. (White Deposition, 72-75).

56. In a report to the Mayor of Minneapolis issued in 1965, the Mayor's Commission on Human Relations found that a passive recruitment system was probably a major factor accounting for the low percentage of non-white employment in the City as a whole. (Exhibit 47). The evidence presented to the Court substantiates this finding with respect to the fire department. White fire department personnel and white city employees who knew of fire fighter openings can reasonably be expected to spread the word of

such openings to other white persons. And despite a history of only one minority fire fighter over a period from 1945 to 1962, and none since then, there was no aggressive minority recruitment program for fire fighters until 1970.

57. During the period when fire fighters were being recruited in 1970, there were efforts made by the Civil Service Commission to make direct contact with prospective minority applicants. (Exhibit 58). Those efforts were made in cooperation with the MOER Fireman Employment Subcommittee, a group which was formed under the auspices of Mobilization of Economic Resources (MOER), the local OEO anti-poverty agency. Prior to 1970 efforts were made to inform community agencies of the availability of fire fighter positions by mailing announcements to them, but no effort at positive recruitment, such as was done in 1970, was made in earlier years. (White Deposition, 73-75).

58. Another factor in the creation of an all-white fire department in Minneapolis was the bad reputation which that department had in the minority community in Minneapolis for fair hiring practices with respect to minority persons. Testimony given at the hearing by Black residents of Minneapolis, including longtime residents and more recent arrivals, including younger men recently active in the work of the MOER Subcommittee as well as older men who had been active in the minority community for many years, established that the minority community has viewed the Minneapolis Fire Department as an agency of the city in which they were not welcome. This view of the fire department in the minority community was corroborated by the testimony of the former executive di-

rector (a white man) of the former Minneapolis Fair Employment Practice Commission and by the defendant White. This bad reputation of the fire department may be traced in part to incidences of possible overt discrimination as in the cases of Payne Calhoun (Exhibits 88-91) and Matt Little (Exhibits 76-77). But the breadth of this bad reputation results, as much as anything, from the fact that minority persons had not seen their fellows on fire trucks over the past twenty-five years.

59. There are no oral examinations now used in conjunction with the fire fighter examinations. (Exhibit 1). They have not been used since 1955. (Stipulation ¶ 27). Oral examinations were given in 1950, 1952, and 1955. (Stipulation ¶ 22, Exhibits 9-10). At least three examiners were involved in each oral examination, with the final grade on the oral examination being an average of the three scores. (Exhibits 18-29, 77; Stipulation ¶ 25).

60. During the three years oral examinations were used, a total of 326 persons took the examination. Three Black men took the oral examinations; one in 1950 and two in 1952. The only person to fail on an oral examination was Matt Little, a Black man who took the oral examination in 1950. He was the only applicant out of 115 to fail that examination in 1950. (Exhibits 18-20, 76, 77; Stipulation ¶¶ 23-26).

61. Mr. Little received grades of 65%, 70% and 70% from the three examiners. He was assigned an average grade of 68.33% by the Civil Service Commission. His grade of 68.33% was significantly lower than any other oral examination grade given in 1950, or in the years 1952 and 1955. (Exhibits 20, 76, 77; Stipulation ¶¶ 25-26).

62. The statistical evidence alone supports an inference that racial discrimination was involved in Mr. Little's failure on the oral examination in 1950.

63. In the course of an investigation of a charge of racial discrimination with respect to Mr. Little's grade by the former Minneapolis Fair Employment Practice Commission, the examiner who scored Mr. Little 65% made comments to the effect that he didn't think it would be good for only one Black man to join the department, that he thought Mr. Little's service in the medical corps during the war meant that he was carrying slop buckets, and that he was surprised that Mr. Little was not a flashy dresser. Despite his denials of any attempt to discriminate against Mr. Little, the evidence points directly to the fact that Mr. Little failed the oral examination because of his race. (Exhibits 76-77).

64. The Fair Employment Practice Commission, in its attempt to reach a settlement in the case of Mr. Little, failed to obtain an agreement with the Civil Service Commission that the decision of the oral examiners should be overruled. The Fair Employment Practice Commission minutes of December 4, 1950 state that "the Civil Service Commission had agreed to change its examination procedure for the future so that a grade of 70 will no longer be required in oral examinations." (Exhibit 76).

65. The examination plan for the fire fighter examinations given in 1950, the time when Mr. Little took the examination, states that the written examination will be given a weight of eight, the oral examination will be given a weight of two, and that a "minimum of 70 per cent is required in all parts of the examination to qualify." (Ex-

hibit 10). There is no existent copy of the examination plan for 1952 (Stipulation, page 2), but the examination plans for 1955 and 1957 contain identical statements. (Exhibits 8-9). No change was made until 1957, when, as the minutes of the Civil Service Commission state, the examination plan was amended because "a study had been made of the last three examinations and it was found that no one had been disqualified by the oral examination." (Stipulation, ¶ 27). The last three examinations referred to would include the 1950 examination, which Mr. Little failed.

66. The continued use of oral examinations after the Matt Little incident reflects an indifference by the Civil Service Commission to the use of examination procedures which had proven susceptible to racial discrimination.

67. From 1950 through 1964 the Civil Service Commission required that all persons who applied for the fire fighter position must be high school graduates, except that veterans could qualify with a G.E.D. certificate or its equivalent. In 1967 and 1968, a high school education was still required, but all persons, not only veterans, were permitted to qualify with a G.E.D. or its equivalent. Throughout this entire time, the education requirement had to be satisfied as of the time the application was submitted. (Exhibits 2-10).

68. Prior to 1963, there is no data available regarding the relative numbers of minority students in Minneapolis who completed a high school education. From 1963 on, the Minneapolis Public Schools have conducted "sight counts" of students present in school on a given day each year either in November or December. These studies show

that the percentage of Black, Indian-American and Spanish-surnamed-American students at the elementary level is consistently higher than the percentage of such students in junior high school. Furthermore, the percentage of such students in junior high school is consistently higher than the percentage of students in senior high school (Exhibits 78-80).

69. In 1963, Black students constituted 6.3% of all elementary school pupils, but only 3.0% of all senior high school students were Black. In that same year, 1.5% of the senior high school students were Indian-American. In each year since 1963, the percentage of Black and Indian-American pupils in senior high school has been substantially less than the percentage of such students in the elementary grades. In 1969, there were about one-third less Black pupils in grade twelve in senior high school (6.48%) than there were in the city's elementary schools. These figures demonstrate persuasively that a requirement of a high school diploma is going to disqualify a higher proportion of Blacks than Whites. (Exhibits 78-80).

70. Although there is no public school data for the years prior to 1963, the census data for 1960 indicates that a substantially smaller percentage of non-white persons in Minneapolis have completed four years of high school education. On the basis of that census data and on the basis of the continuing trend evidenced by the school data, it is reasonable to infer that the high school education requirement for 1968 and the years prior to that would have had a substantial discriminatory effect against non-white applicants. Since the qualification is stated in the announcement, the effect would have been evidenced in substantially smaller numbers of non-white applicants. (Exhibit 85; Stipulation ¶ 65, Table VIII).

71. There is no indication that the high school education requirement was an essential and necessary qualification for the position of fire fighter. The evidence shows that no substantive knowledge of fire fighting practices or procedures is essential for the fire fighter applicant. The evidence also indicates that the essential prerequisite for a fire fighter is the ability to learn these fire fighting practices and procedures. There is no evidence which establishes that a high school education is in any respect a necessary indication that the applicant has such ability to learn. An educational requirement for promotions within the department may have some justification, but at the entry level position of fire fighter there is no necessary basis for that position. (White Deposition, 51; Hall Deposition, 58-59; Exhibit 45).

72. The Civil Service Commission gives an absolute preference in certification in all positions, including fire fighter, to qualified veterans. Under state law, a veteran, unless he enlisted from the State of Minnesota, must have lived in the state and locality to which application is made for a period of five years (excluding military service time) in order to qualify. (Exhibit 56; M.S.A. §197.45).

73. The importance of having a veterans preference is exemplified by the fact that of the persons who ere employed as fire fighters with the Minneapolis Fire Department as of July 10, 1970, who were hired as a result of examinations conducted from 1957 through 1968, a total of 139 had claimed the veterans preference. In percentage terms, approximately 60% of these fire fighters had claimed the veterans preference. State law also requires that a five point preference be given to similarly qualified

veterans on promotional examinations. (M.S.A. § 197.45; Stipulation ¶¶ 46-64).

74. The importance of claiming a veterans preference is reflected in the fact that veterans are hired first, with nonveterans, even though they have higher scores, waiting for a year or more to be hired after the first veterans are hired. Thus, as a result of the fire fighter examination given in 1961, a group of ten veterans was hired first (Stipulation ¶ 55), approximately one year later another group of five veterans was hired (Stipulation ¶ 56), approximately three months later another group of eight veterans was hired (Stipulation ¶ 57), and seven months after that a group of one veteran and ten non-veterans was hired (Stipulation ¶ 58).

75. While the durational residency requirement may appear neutral on its face, the five-year period of residency serves to eliminate a disproportionate number of minority applicants. The census data for 1960 reflects the commonly known fact that there has been an influx into northern central cities of minority persons. The 1960 Census Report reflects this movement in statistics which show the length of time in which housing units have been occupied by white households and non-white households respectively. These figures show that more white households on a proportionate basis, have occupied the specific housing units in which they reside in 1960 than non-white households have. Thus, 44.08% of white households lived in the same dwelling in 1960 as in 1954; only 21.41% of the non-white households lived in the same dwelling in 1960 in which they lived in 1954. These figures reflect substantially greater mobility on the part of non-white households. It

follows that non-white persons would have been disqualified for a veterans preference to a far greater extent than white persons. (Exhibit 85; Stipulation ¶ 65, Table IX).

76. The data with respect to current applicants reflects a similar disproportionate effect of the durational residency requirement for minority applicants. Approximately 13 applicants who are residents of Minneapolis would be unable to claim a veterans preference because they do not satisfy the five-year requirement. Five of these are minority applicants. (Stipulation ¶ 11, Group I-B).

77. The disproportionate effect of the durational residency requirement on minority persons was another factor which effectively would have deterred them from applying for the fire fighter position.

Findings with Respect to the Most Recent Examination Plan and Recruitment Period

78. Some changes have been made in the hiring practices and procedures of the Minneapolis Civil Service Commission with respect to all classifications of employees since 1965.

79. With respect to recruitment for fire fighters, an effort was made to advertise the availability of fire fighter employment in the local newspapers which reach the minority community. As has already been stated, an advertisement was placed in the Minneapolis Spokesman in 1967, although it appeared too late to be of any use. Advertisements were also placed in the Observer, although there is no indication in the record how extensive this advertising was before 1970.

80. In 1969, a Black Urban Corps intern working with

the Civil Service Commission staff submitted a report to the Commission regarding the effect of civil service selection procedures on minority groups. This report was highly critical of civil service requirements which were higher than necessary for the job offered and which incorporated examinations which were slanted to a white middle class vocabulary. The report also recommended that the Commission adopt a statement incorporating specific procedures which would be adopted to assure equal employment opportunity. (Exhibit 50).

81. As a result of this report, the Civil Service Commission, in November, 1969, adopted a Policy Statement on Employment which incorporates many of the suggested changes. According to that Policy Statement, the Commission is now attempting to assure that job qualifications stated in its examination plan are relevant to the actual requirements of the job and that examinations are analyzed to remove elements of cultural bias which screen out otherwise capable minority applicants. (Exhibits 51-52; White Deposition, 68-69).

82. Significant changes in fire fighter recruitment were implemented by the Civil Service Commission staff in cooperation with the MOER Firemen Employment Subcommittee. This Subcommittee was established under the auspices of MOER. In addition to members of the MOER staff, the defendant White and Miss Barbara Hanson of the Civil Service Commission staff were active members of this staff. Several fire fighters were also active members of the Subcommittee, including Gordon Norheim, the president of the Fire Fighters Association, the local fire fighters union. These fire fighters volunteered their own

time to aid the Subcommittee in its efforts to obtain minority fire fighters. Representatives of other community agencies which are active in furthering minority employment were also members of the Subcommittee. During the late winter and spring of 1970, this Subcommittee attempted to effect changes in Civil Service practices regarding the hiring of fire fighters, with special emphasis on the examinations used, the requirements for the job, and recruitment procedures.

83. On April 23, 1970, the Civil Service Commission approved the examination plan for fire fighter. This plan changed some of the requirements for fire fighter which had been incorporated in earlier fire fighter examination plans. Over the protest of the defendant Hall, the height requirement was lowered from 5'8" to 5'6". The eyesight requirement was liberalized. The entry level age was lowered from 21 to 20. An applicant was permitted to obtain a G.E.D. certificate before being hired; he no longer had to have such a certificate at the time he applied. And the absolute felony conviction bar was eliminated. (Exhibits 1, 2, 69—minutes of CSC, 4-23-70.)

84. On May 12, 1970, Fred Herndon, who was then Chairman of the MOER Subcommittee, sent a letter to the defendant Proctor, which outlined the Subcommittee's recommendations regarding fire fighter employment requirements. The Subcommittee suggested changing the minimum age requirement to 18 years, dropping the high school or G.E.D. equivalent requirement except for promotional purposes, dropping the height requirement, eliminating the arrest-conviction requirement as stated, and permitting an applicant to obtain a valid driver's license by the

end of six months' employment. The Subcommittee also recommended changes in the written examination. (Exhibit 69—letter of May 12, 1970).

85. On May 14, 1970, in response to the Subcommittee's proposals, the Civil Service Commission scheduled a special meeting to study these recommendations. (Exhibit 69—CSC minutes of 5-14-70).

86. On the following day, May 15, 1970, the defendant Hall distributed to all fire department personnel a memorandum which characterized the Subcommittee's proposals as an effort to lower standards. In this memorandum he made specific reference to Civil Service Commission minutes which related that Gordon Norheim, the Fire Fighters Association president who had served on the MOER Subcommittee, had stated that he did not think that height was a relevant factor in fire fighting. (Exhibit 69—memorandum dated May 15, 1970).

87. Participation by fire department personnel in the activities of the MOER Subcommittee lessened after this memorandum was issued.

88. On May 27, 1970, the defendant Hall wrote to the defendant Proctor with recommendations for the fire fighter examination plan, which included keeping the age requirement at 20 years, maintaining the 5'8" height requirement, requiring minimum college credits, and requiring a Minnesota chauffeur's license. (Exhibit 69—memorandum dated May 27, 1970).

89. On May 28, 1970, the Civil Service Commission considered the defendant Hall's letter of May 27, 1970, and the memorandum he issued to all fire fighter personnel

on May 15, 1970. The defendant Glover directed that he be placed on record reprimanding the defendant Hall for issuing a memorandum "which through misstatement of fact, distortion, and innuendo sets the climate for discouraging qualified minority persons from applying for the forthcoming fire fighter examination." The Commission unanimously agreed to refer the matter to the City Council for investigation and action. The Commission also scheduled a public hearing on the requirements for the fire fighter position. (Exhibit 69—CSC minutes, 5-28-70).

90. The Commission recommendation that the City Council investigate and take action with respect to the defendant Hall's memorandum (Exhibit 69—letter of June 5, 1970) has not been followed up by the Commission.

91. After a public hearing held on June 8, 1970, the Civil Service Commission voted, with the defendant Glover dissenting, rejected a proposal submitted by the Urban Coalition of Minneapolis and supported by the MOER Subcommittee that a specified number of fire fighter positions be set aside for minority applicants. The specific proposal considered by the Commission was the defendant Glover's motion that "24 Fire Fighter positions be set aside for qualified eligibles, 10 to be appointed from the up-coming eligible list, and 14 over the next two years." (Exhibit 69—letter dated July 13, 1970, CSC minutes for 8-13-70, CSC minutes for 8-20-70, CSC minutes for 9-10-70).

93. During the time from May, 1970 through September, 1970, when these efforts were being made by the MOER Subcommittee and other groups to effect changes in the fire fighter qualifications and to seek Commission approval of the proposal setting aside fire fighter positions

for qualified minority applicants, increased efforts were being made to recruit minority applicants for fire fighter and changes were made in the written portion of the fire fighter examination.

94. The Civil Service Commission staff relied heavily upon suggestions by the MOER Subcommittee in implementing its recruitment program. The Commission staff advertised the position in the Spokesman, Observer, and Courier, as well as in other media. Fire fighter applications were sent by the Commission staff to various community agencies and to a large number of prospective minority applicants whose names were submitted by these agencies. The Commission staff initiated CORC—Civil Service Opportunity Recruiting Clinic—a mobile employment recruitment van which went to community centers throughout the city during the time fire fighter applications were received. The Commission staff also notified prospective applicants of the availability of pretest tutoring sessions which were held throughout the city at community centers and which were conducted by members of the Commission staff and the fire fighters who volunteered their time. (Exhibit 58-64; White Deposition 57-60, 74-75, 100).

95. The MOER Subcommittee personnel who contacted prospective minority applicants were met in the great majority of cases with the reaction that there was no chance for a minority person to become a fire fighter with the Minneapolis Fire Department.

96. As a result of these recruitment efforts, a total of at least 26 Blacks, Indian-Americans and Mexican-Americans applied for the fire fighter position out of a total of 494 applicants. (Stipulation ¶¶ 4, 8).

97. The Civil Service application form does not require an applicant to state his race. A supplementary card can be filled out which does state race. (Exhibit 75). Since all applicants did not fill out this supplementary form, the list of minority applicants in the stipulation may be incomplete. However, a comparison of the names of currect applicants contained in the Stipulation, ¶¶ 5-14, with the names of persons supplied by the various community agencies contained in the lists which make up Exhibit 60, indicates that only one name on those lists, that of Kenneth Zubrod, does not appear among the names listed in paragraph eight of the Stipulation. Whether Mr. Zubrod is a minority applicant is not clear from the evidence. In any case, since the major thrust of the minority recruitment program was through these agencies, the number of additional minority applicants is not likely to be high.

98. The existence of an all-white fire department, the failure of the defendant Hall to assist in minority recruitment, and the positions taken by the defendant Hall in his memorandum of May 15, 1970 and his letter of May 27, 1970 were a serious impediment to effective minority recruitment for fire fighters in the summer of 1970.

99. The defendant Hall's letter to the defendant Proctor dated May 27, 1970 and incorporated in Exhibit 69, especially insofar as it requests minimum college credits and a chauffeur's license as entry level requirements was, in the context of the MOER Subcommittee's efforts, a rebuff to efforts to implement an effective minority recruitment program.

100. The defendant Hall had no basis for suggesting that a chauffeur's license be required for the fire fighter

applicant. While the fire department does legitimately require engine and truck drivers to have a chauffeur's license, the fire department operations manual prohibits a probationary fire fighter (his first six months) from driving this equipment. Furthermore, only fire motor operators (drivers), regularly assigned Chief's Aides, and fire fighters on the fire motor operator eligibility list are required to have chauffeur's licenses. (Exhibits 45, 72-74).

101. The current examination for fire fighters includes a written examination and an agility (physical training) test. Eighty per cent of the score is based on the written examination and twenty per cent of the score is based on the agility test. An applicant must attain a qualifying score of seventy per cent in both examinations. (Exhibit 1).

102. As a result of the discussions with the MOER Subcommittee in the furtherance of the Civil Service Commissions employment policy (Exhibits 51-52), the Civil Service Commission staff rejected the previous written fire fighter examinations (Exhibits 32-35) and developed a new written examination which required the applicant to answer fifteen to twenty multiple-choice questions based upon each of the three films to be shown at the examination. The examination also included a standard form mechanical comprehension test. (Exhibit 23A; White Deposition 38-42).

103. On August 20, 1970, the City of Minneapolis entered into a contract with Personnel Decisions, Inc., a consultant firm providing professional services to businesses and governmental bodies in vocational testing and related fields. This contract required the consultants to en-

gage in certain test validation studies and to compile a manual for use by the Civil Service Commission staff in test validation. (Exhibit 55).

104. In conjunction with Personnel Decisions, Inc., the Civil Service Commission staff planned validation studies of the proposed written examination. (White Deposition, 41-57).

105. Until this Court enjoined the administration of the fire fighter examination on November 5, 1970, that examination had been scheduled to be given on November 16, 1970. At that time, these validation studies had not been completed.

106. At the time her deposition was taken on February 11, 1971, the defendant White testified that the written examination was ready to be given, subject to studying the test and investigating its validity. At the hearing she indicated that a new examination would be devised or purchased because the scores on the proposed examination tended to bunch in such a manner as to make it an inadequate selection device.

107. The defendant White and the defendant Gallagher both testified that no fire fighter examination would be given until studies had been completed which establish that the examinations are not biased against minority applicants and do predict job performance as a fire fighter.

108. The present examination plan states that an applicant for the fire fighter position must have a satisfactory arrest record. Promotional literature also refers to a satisfactory arrest record. (Exhibit 1; White Deposition, 14-16).

109. According to the testimony of the defendant White, the Civil Service Commission staff did not and does not actually consider a fire fighter applicant's arrest record when determining his qualifications. (White Deposition, 14-16).

110. The testimony of the defendants Glover, Gallagher, and Hall reflected considerable confusion on their part whether the Commission staff did in fact consider arrest records. Their confusion must be shared with prospective fire fighter applicants.

111. Considering the arrest data contained in Stipulation ¶ 36 and Exhibit 81, it is apparent that any use of arrest records as an employment qualification is going to weigh most heavily against minority applicants.

112. An arrest record in itself is not of sufficient probative value to use it in selecting fire fighters, especially when that requirement as stated in Exhibit 1 would have the effect of deterring a proportionately larger number of minority applicants from applying for the position.

113. The present Civil Service Commission practice is to consider only a conviction record in determining an applicant's qualification for the fire fighter position. A point system was adopted by the Commission to differentiate between convictions for misdemeanors and felonies and, with respect to felonies, to differentiate between recent and earlier convictions. (Exhibit 67). The Commission has rejected the earlier position that any conviction of a felony is an absolute bar to employment as a fire fighter. But the Commission is also considering making changes in the present system set forth in Exhibit 67. The procedure intended to be followed with respect to the present group of fire fighter applicants is not now established.

114. The conviction record contained in Stipulation ¶¶ 37-44 and Exhibits 82-84 when compared with the census data contained in Stipulation ¶ 65 and Exhibit 85 establishes that any conviction record requirement for fire fighter applicants will affect a proportionately larger number of minority applicants.

115. The defendant Commissioners will reconsider an applicant's disqualification on the basis of a conviction record if he requests reconsideration at the staff level and is not satisfied with the disposition made. However, there is no notice of the possibility of staff or Commission reconsideration contained in the Civil Service Commission rejection notice. The form used for that purpose also refers to "arrest record" rather than "conviction record" as the basis for the finding. (Exhibit 87).

116. The testimony of two of the defendant Commissioners indicates that no serious consideration has been given to establishing standards whereby the relation of the conviction of any particular felony or misdemeanor to adequate performance as a fire fighter can be judged. One of the testifying Commissioners was unaware of what distinction there was between a felony and a misdemeanor.

117. No compelling employment interest on the part of the Civil Service Commission has been established which supports disqualification of an applicant for fire fighter on the basis of a felony conviction which occurred more than five years prior to his application.

118. No compelling employment interest on the part of the Civil Service Commission has been established which supports disqualification of an applicant for fire fighter on the basis of a misdemeanor conviction which occurred more than two years prior to his application.

119. No compelling employment interest on the part of the Civil Service Commission has been established which supports disqualification of an applicant on the basis of felony or misdemeanor convictions without regard to the applicant's subsequent record, without regard to the type of criminal act involved, without regard to the circumstances in which the criminal act occurred, and without regard to the effect which that type of criminal behavior would have on the applicant's performance of fire fighter duty.

120. The present fire fighter examination plan (Exhibit 1) states the following educational requirement:

> High school diploma or G.E.D. certificate (If you are in the process of obtaining a G.E.D. certificate, your application may be accepted; however, you must have your G.E.D. completed before you are hired.)

121. Minneapolis Public School data indicates that there is a significantly higher drop-out rate for minority students than for white students. It follows that a disproportionate number of minority persons do not receive a high school diploma. (Exhibits 78-80).

122. The stated educational requirements have the effect of discriminating against minority applicants on the grounds of their race.

123. No substantive job knowledge is required of the fire fighter recruit when he comes to the fire fighter training school (drill school). He is not expected to know at that time the names and uses of the various fire fighting implements, apparatus, and equipment. He is not expected to know the procedures which are utilized by the Minneapo-

lis Fire Department. He is not expected to know principles upon which fire fighting techniques are based. (Hall Deposition, 13-37, 58-59).

124. The Minneapolis Fire Department seeks applicants who have the ability and the willingness to practice and to learn the procedures of fire fighting followed by the Minneapolis Fire Department. The requisite ability to learn does not imply the ability to have immediate and long-lasting retention of principles or procedures which are demonstrated on one occasion or on a few occasions, for the Minneapolis Fire Department engages in continuing retraining of all personnel on all aspects of fire fighting procedure and theory. (White Deposition, 51; Hall Deposition, 14-15, 25, 34-35, 58-59; Exhibit 45).

125. Attaining a high school diploma or a G.E.D. certificate may evidence the learning ability necessary for fire fighter training, but such education cannot be considered a necessary indication of such ability.

126. The currently scheduled written examination, when it is validated in accordance with the defendants' plans, should determine whether the applicant has the ability to learn necessary for fire fighter training and for adequate performance of fire fighter duties. (White Deposition, 51).

127. Formal education at the high school level or beyond may be necessary for higher ranking positions in the fire department (Exhibits 86, 96), but there is no evidence to suggest that high school education or its equivalent is essential for the entry level position of fire fighter.

128. Mere surmises by the defendants that education

is beneficial or that the better educated man will be better on the job, in the absence of an established relationship between formal education and success on the job, cannot justify the use of employment qualifications which will have a discriminatory impact on minority groups.

129. The present examination plan states that an applicant must be at least 20 years old but not yet 30 years old, except for veterans, who may apply up to age 35. (Exhibit 1).

130. The fire fighter hiring practices described above have discriminated against minority persons who are now aged 30 through 34 and no longer eligible for fire fighter employment unless they are veterans.

131. The defendant Hall stated that he would not favor lowering the minimum age to 18 years, but "would not put up very much opposition to it either." He suggested that a mature and stable individual would be required. He also indicated that he had had no experience with fire fighters aged 18 and 19. (Hall Deposition, 49-50).

132. The defendant Commissioners established the entry level age requirement of 20 years without reference to any established relationship between that age and the requirements and responsibilities of the position of fire fighter with the Minneapolis Fire Department.

133. The Court can take judicial notice of the fact that 18 and 19 year old men are members of the military service and are required to act responsibly under battlefield conditions which involve stress and tension equal to if not greater than the stress and tension involved in fire fighting.

134. The unemployment rate of minority males aged 18 and 19 is significantly higher than the unemployment rate of white males in that same age bracket. (Exhibit 95).

135. The chances of success of an affirmative recruitment program would be significantly increased if recruitment efforts could be directed at 18 and 19 year old minority persons.

136. If the requested minority preference is not imposed by the Court, the following procedure will be followed by the defendants in certifying fire fighter applicants:

a. An eligibility list will be established ranking those applicants who pass the examination in order of their average score on both the written and agility examinations.

b. Applicants must pass the medical examination.

c. First preference will be given to applicants who satisfy the one-year residency requirement in Minneapolis and who can claim a veterans preference under Minnesota law. These persons would be certified in order of their relative standing on the eligibility list.

d. Second preference would be given to applicants who satisfy a one-year Minneapolis residency requirement and who do not claim a veterans preference. These persons would be certified in order of their relative standing on the eligibility list.

e. Third preference will be given to applicants

who do not satisfy the one-year Minneapolis residency requirement but who do qualify as veterans. These persons would be satisfied in order of their relative standing on the eligibility list.

f. Fourth preference will be given to applicants who do not satisfy the one-year Minneapolis residency requirement and who do not qualify as veterans. These persons would be certified in order of their relative standing on the eligibility list. (Exhibits 56-57).

137. On the basis of the information contained in the applications completed by fire fighter applicants, it is possible to state in approximate terms the number of fire fighter applicants in each of the aforementioned preference groups, although there may be as much as a ten per cent error involving either underinclusion or overinclusion of applicants in each group. (White Deposition, 96-99).

138. The names of the current applicants and their probable classification within the aforementioned preference group are set forth in the Stipulation, ¶¶ 11-14. Considering the number of minority applicants in those groups, and the testimony of Elisabeth White at trial, if the requested minority preference is not granted, the chances are that one or maybe two minority applicants may be certified as fire fighters to fill the 40 positions presently available.

139. The practical result of the failure or refusal of the Court to grant a minority preference would be, in all probability, to limit the number of successful minority applicants, even if additional fire fighters are certified, to a very small number.

140. Even if adequate steps are taken to revise the fire fighter qualifications to remove existing requirements which create barriers to employment that affect a disproportionate number of minority persons, the addition of such a small number of minority persons to the Minneapolis Fire Department will not overcome the continuing affects of past discrimination and will not dispell the continued effects of that Department's bad reputation for fair employment practices with respect to minority persons. What is needed now to correct the effects of the past twenty-five years is the immediate certification of at least twenty minority fire fighters.

141. Of the current applicants for fire fighter positions with the Minneapolis Fire Department, approximately 13 persons are veterans and residents of Minneapolis who cannot claim a veterans preference because they have not been residents of the State and the City for the requisite five-year period. Approximately 20 applicants who are not residents of Minneapolis cannot claim a veterans preference because of failure to satisfy the durational residency requirement. (Stipulation, ¶ 11, Group I-B, ¶ 13, Group III-C).

142. The durational residency requirement in the veterans preference act imposes a penalty on otherwise qualified veterans, who do not meet the five-year requirement, for engaging in their constitutionally protected right to travel.

143. There is no evidence to suggest that there is a compelling state interest which is served by the durational residency requirement incorporated in the veterans preference act.

144. The defendants will not incur any significant administrative problems if the durational residency requirements are temporarily enjoined pending the hearing and determination of a three-judge court. There would be no need for the cessation of any certification of applicants.

145. Applicants for positions in the classified service of the City of Minneapolis who are qualified veterans except for the fact that they do not satisfy the durational residency requirement will suffer irreparable harm if the requested temporary restraining order is not issued enjoining the enforcement of that statute pending the hearing and determination of that issue by a three-judge court in that they will lose a preferred position on the eligibility list and will be denied the opportunity of employment and consequent loss of seniority rights which protect them in the case of lay-offs and which govern their opportunities for further promotion. In the case of the present fire fighter applicants, there are approximately 113 applicants who would be offered certification ahead of the thirteen veterans who could be in that group, but for the enforcement of the durational residency requirement. With a limited number of positions available, these thirteen veterans are unlikely to have any chance whatsoever for fire fighter employment.

146. The members of the class of veterans who are disqualified by the durational residency requirement of the Veterans Preference Act which was established by the order of the Court dated November 5, 1970, are adequately represented in the present action.

Conclusions of Law

1. This Court has jurisdiction over this action and these defendants under 28 U.S.C. § 1343(3) & (4).

2. The plaintiffs have established that the practices and procedures used by the Minneapolis Civil Service Commission over the past twenty-five years in hiring fire fighters involved a pattern and practice of discrimination by race in violation of 42 U.S.C. §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. The plaintiffs have established that the practices and procedures used by the defendants in the past two years in hiring fire fighters did not comport with the effective affirmative action to dispel the present and continuing effects of past discrimination which the defendants are required to implement pursuant to 42 U.S.C. §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

4. In the present action, this Court has the obligation to issue a decree which insofar as possible will eliminate the continuing effects of past discrimination in hiring of fire fighters for the Minneapolis Fire Department.

5. This Court has the power and the obligation under 42 U.S.C. § 1981 to impose a limited minority preference in hiring fire fighters for the Minneapolis Fire Department to assure that substantial elimination of the present effects of past discrimination is effected now.

6. The imposition of a minority preference and the necessary limited injunction against the application of M.S.A. § 197.45 and the application of provisions of the

Minneapolis City Charter requiring certification of eligible employees on the basis of their relative standing on competitive examinations under 42 U.S.C. § 1981 is not such injunctive relief as requires a three-judge court pursuant to 28 U.S.C. § 2281.

7. Implementation of the presently stated arrest (conviction) record and education requirements in the Minneapolis Civil Service Commission fire fighter examination plan number 83626 (Exhibit 1) violates 42 U.S.C. §§ 1981 and 1983, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that such implementation creates classifications which have the effect of discriminating against minority fire fighter applicants on the ground of their race, without any compelling state interest therefor and such standards are not reasonably related to the requirements for performance in the position of fire fighter with the Minneapolis Fire Department.

8. Implementation of the presently stated entry level age of 20 in the Minneapolis Civil Service Commission fire fighter examination plan number 8326 violated 42 U.S.C. §§ 1981 and 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that such requirement inhibits an effective affirmative recruitment program to secure minority applicants for the position of fire fighter and is not reasonably related to the requirements of such position.

9. Implementation of the requirement of Minneapolis Civil Service Commission fire fighter examination plan number 8236 which states that a non-veteran applicant must not have reached the age of thirty years violates 42

U.S.C. §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it denies the opportunity for minority persons aged thirty through thirty-four years who have been subject to a pattern and practice of discrimination to apply for the position of fire fighter with the Minneapolis Fire Department without any compelling state interest justifying such denial.

10. This Court must maintain continuing jurisdiction of this action to assure the implementation of the relief granted.

11. The plaintiffs' request for an injunction against the enforcement of the five-year state and local residency requirement incorporated in the definition of "veteran" in M.S.A. § 197.45, Subdivision (1), presents a substantial constitutional question which requires the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284.

12. Pending the hearing and determination of the application for said injunction, a temporary restraining order enjoining the enforcement of these durational residency requirements must issue pursuant to 28 U.S.C. § 2284 (3).

Dated: March 9, 1971.

/s/ EARL R. LARSON,
United States District Judge.

Minneapolis City Council
Official Proceedings
Regular Meeting

February 25, 1972

OFFICIAL PUBLICATION OF RESOLUTION passed by the City Council of the City of Minneapolis, Minnesota, at a regular meeting thereof held February 11, 1972, not approved by the Mayor and passed over his objections at a regular meeting held February 25, 1972.

(Published February 29, 1972, in Finance and Commerce.)

Resolution

(By Aldermen Bergford, Cairns, Brooks, Butler, Strauss, DeMars, Derus, and Erdall.)

Urging the Civil Service Commission not to appeal the decision of the Federal Court of Appeals relating to the hiring of minority groups in the Fire Department.

Whereas, the District Court in St. Louis has made a decision requiring the selecting of one minority fireman out of every three hired; and

Whereas, Minneapolis Fire Dept. leaders favor this solution to give minorities an increased opportunity to join the Fire Dept.; and

Whereas, the long delay involved in reaching this decision has resulted in a critically undermanned Fire Dept; and

Whereas, now is the time to make a decision and resume the hiring of badly needed firemen;

Now, Therefore, Be It Resolved by the City Council of the City of Minneapolis:

That the Civil Service Commissioners be strongly encouraged to abide by the St. Louis court decision and that no appeal by made to its ruling.

Passed February 11, 1972. Richard M. Erdall, President of the Council.

Vetoed February 15, 1972, by the Mayor.

Attest: Lyall A. Schwarzkopf, City Clerk.

State of Minnesota,

ss.

County of Hennepin.

I, Lyall A. Schwarzkopf, City Clerk of the City of Minneapolis, County of Hennepin, State of Minnesota, do hereby certify that the foregoing resolution was passed by the City Council of said City at a regular meeting thereof held February 11, 1972, and was returned by Charles Stenvig, Mayor, without his approval and stating his objections at a regular meeting held February 25, 1972.

I do hereby certify that at the regular meeting of February 25, 1972, said resolution was passed notwithstanding the objections of the Mayor, by a vote of more than two-thirds of all the members of the City Council; the vote being: Yeas, 10, nays, 3 (total number of Aldermen in the Council—13).

Therefore in accordance with the provisions of Section 1, Chapter 3 of the City Charter of the City of Minneapolis, said resolution has become a valid resolution, and I hereby certify that it has the same force and effect as if approved by the Mayor.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said City this 25th day of February, 1972.

LYALL A. SCHWARZKOPF,
City Clerk.

38640

[As reported in Finance and Commerce, February 29, 1972, p. 6, col. 6.]

Minneapolis City Council
Official Proceedings
Regular Meeting

March 10, 1972

Alderman Cairns moved that the City Attorney be directed to prepare an Amicus Curiae Brief on behalf of the City Council to be filed with the Supreme Court of the United States in the case of Gerald Carter, et al. v. Hugh Gallagher, et al., said brief to be supportive of the contentions of the Plaintiffs that the best interests of the City would be served by conclusion of the case at the earliest possible time and that the Writ of Certiorari not issue.

Seconded by Alderman Bergford.

Adopted. Yeas, 10; nays, 3, as follows:

Yeas—Aldermen Sivanich, Cairns, Strauss, Derus, DeMars, Bergford, Butler, Zollie Green, Brooks, President Erdall—10.

Nays—Aldermen Christensen, Anderson, Russell Green—3.

[As reported in Finance and Commerce, March 14, 1972, p. 7, col. 6.]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 1265

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

Petitioners,

v.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL, III, BENJAMIN E. MCHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Of Counsel:

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May 5, 1972

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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OCTOBER TERM, 1971

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and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The International Association of Fire Fighters (IAFF) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorneys for the petitioner and for the individual respondents has been obtained. The consent of the

attorney for the respondent Minneapolis Commission on Human Relations was requested but refused.

The interest of the IAFF in this case arises from the fact that it is an international labor organization of which approximately 142,000 fire fighters performing their duties in more than 1,400 municipalities throughout the Nation, including those fire fighters employed by the City of Minneapolis, are members.

In the instant case, the petitioner quite properly argues with respect to the validity of the laws and regulations applicable to fire fighters employed by the City of Minneapolis. In supporting the position of petitioner the IAFF desires to inform the Court of the importance of the questions presented to members of IAFF generally, and the inhabitants of municipalities for whom they perform fire fighting duties. The interest of the IAFF and its members in the questions presented shows that the judgment below will have a substantial adverse effect upon the safety and welfare of fire fighters generally and the citizenry of the Nation as a whole.

Respectfully submitted,

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May 5, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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v.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL, III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF AMICUS CURIAE FOR INTERNATIONAL ASSOCIATON OF FIRE FIGHTERS

INTEREST OF AMICUS CURIAE

The International Association of Fire Fighters (IAFF) was organized under the jurisdiction of the American Federation of Labor on February 18, 1918.

Its membership is comprised of approximately 142,000 fire fighters who are also members of more than 1,400 local unions affiliated with the IAFF.

Approximately ninety-seven per cent (97%) of the members of IAFF are employed by municipalities within the various states of the Union, and other members are employed by federal agencies and industries. Most of the municipalities employing fire fighters have promulgated civil service regulations and other laws that relate to the employment of fire fighters and their working conditions. Qualification for employment as a municipal fire fighter usually requires the passing of a competitive civil service examination. Within the knowledge of the present officers of the IAFF such examinations have been validated, or have been otherwise shown to be "job related", in the judicial context of such terms as articulated in civil rights disputes.

The experience of the IAFF and its members demonstrates that successful fire fighting requires the unqualified effort of all fire fighters working as a team. In the performance of his job, the fire fighter is an integral part of a unit, the fire company. The successful performance of his duties requires the continued development of particular skills, and the acquisition and accumulation of knowledge of fire fighting procedures. Failure on the part of one fire fighter to perform his duties in the most competent manner serves not only to jeopardize his safety, the safety of his co-workers, but the property and lives of the citizenry whom the fire fighter seeks to serve.

ARGUMENT

The requirement of the *en banc* decree below is to prefer minority applicants for employment over other applicants solely because of their minority status by reason of race, color or cultural background. While the judgment recognizes that eligible applicants must have passed the required competitive examination for employment, it will require that the order of employment provide priority for one minority applicant of each three applicants employed. Such procedure prohibits the continued implementation of civil service regulations which provide for priority of employment on the basis of the score attained in competitive examination.

It is the position of the IAFF that the judgment below grants an unlawful preference to the minority applicants which will have the effect of requiring employment of those applicants demonstrably not as competent as other applicants to perform the duties of fire fighters. Such preference is to be given despite general recognition that the best qualified applicant can be expected to be the most qualified fire fighter to protect the interests of his co-workers, and to more efficiently serve the needs of the citizenry of the communities served.

The question whether qualifications of fire fighters in the performance of their duties can lawfully be depreciated solely for the purpose of granting employment to minority applicants is a substantial question affecting the safety and welfare of the citizenry of the Nation, including fire fighters and their families, and a question which should be reviewed by the Court.

CONCLUSION

For these reasons and those set forth in the petition filed herein a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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May 5, 1972